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In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 974-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
KAREN C. LIEBERMAN
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 107 S. Ct. 3078 (1987), this Court held that an attorneys' fee multiplier reflecting the risk of loss in litigation is unavailable under federal fee-shifting statutes. Nevertheless, the court of appeals authorized a risk multiplier in this class action brought under the Magnuson-Moss Act, holding that *Delaware Valley* and the express limitation on attorneys' fees contained in the Act were irrelevant because the parties reached a settlement that resulted in the creation of a monetary fund to compensate the plaintiff class. The question presented is as follows:

Whether, in class actions filed under federal statutes that provide for an award of attorneys' fees, a "risk multiplier" is available, notwithstanding this Court's decision in *Delaware Valley* and Congress's express limitation on the amount of attorneys' fees, whenever there is a settlement that produces a monetary fund for the plaintiff class.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Respondent Arlie Glen Skelton is the named representative of a plaintiff class consisting of:

> All original owners (other than solely for purposes of resale) of a General Motors 1976-1980 model year vehicle equipped with a THM 200 transmission purchased in the United States, its possessions and territories, or the District of Columbia, who incurred any transmission repair expense within the first 50,000 miles of use of that vehicle.

Respondent law firms seeking attorneys' fees are: Sachnoff, Weaver & Rubenstein; Charles A. Boyle & Associates; Corinblit & Seltzer; Abraham N. Goldman & Associates, Ltd.; Goodkind, Weschler, Labaton & Rudoff; Frances E. Goodman, P.C.; William J. Harte, Ltd.; Law Offices of Beverly C. Moore, Ltd.; and Zwerling, Schacter & Zwerling.

Petitioner General Motors Corporation's subsidiaries (excluding wholly-owned subsidiaries) and affiliates are listed in App., *infra*, 77a-79a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

General Motors Corporation ("GM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 860 F.2d 250. The initial opinion of the district court (App., *infra*, 21a-68a) is reported at 661 F. Supp. 1368. The opinion of the district court on remand from the court of appeals (App., *infra*, 69a-72a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1988 (App., *infra*, 1a). A timely petition for rehearing with suggestion for rehearing en banc was denied on January 13, 1989 (*id.* at 73a). On March 27, 1989, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including May 13, 1989 (*id.* at 76a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Act") authorizes awards of attorneys' fees subject to the following limitations (15 U.S.C. § 2310(d)(2)):

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

STATEMENT

The question in this case is whether respondent law firms may be awarded an attorneys' fee multiplier—over and above the reasonable lodestar fee based on time actually expended and reasonable hourly rates—because their receipt of fees was contingent upon prevailing in this action. In *Pennsylvania* v. *Delaware Valley Citizens' Council*, 107 S. Ct. 3078 (1987) ("*Delaware Valley II*"), this Court held that litigation risks do not justify a multiplier to the lodestar fee. Nevertheless, the court of appeals held that a risk multiplier can be awarded here on the theory that the fees would be paid from a monetary fund established by a settlement.

The court of appeals' ruling is flatly inconsistent with the rationale of *Delaware Valley II* and distorts the litigation system in ways that are totally at odds with congressional intent. The decision below leads to the untenable result of providing the largest awards of attorneys' fees in the least meritorious cases, thereby encouraging the filing of marginal suits that consume scarce

litigation resources and diverting lawyers from more substantial claims whose prosecution would better promote federal statutory policies. Equally disturbing, by making the availability of fee multipliers turn on the existence of a monetary settlement, the decision below gives class counsel a direct financial stake in settling a case regardless of the best interests of the class, thus engendering an intolerable conflict of interest between the class members and their attorneys.

The court of appeals' decision is both bad law and bad policy. In *Delaware Valley II*, this Court sought to put an end to attorneys' fee multiplier claims in cases brought under federal fee-shifting statutes. Contrary to the court of appeals' reasoning, the commonplace occurrence of a monetary settlement does not alter the governing principles that preclude multipliers in such cases or justify the attempt of respondent law firms to appropriate more than $1 million that otherwise would go to their class-member clients. As a practical matter, the decision below, unless reversed, will make *Delaware Valley II* a dead letter in the vast number of class action cases in which a settlement is negotiated.

A. Background

1. General attorneys' fee principles

In the American legal system, the party that prevails in litigation traditionally must pay its own attorneys' fees. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). The courts have recognized an exception to this American Rule in so-called "common fund" cases in which attorneys' fees are payable from a monetary award that the lawsuit achieves for the benefit of claimants in addition to the named plaintiff. See, *e.g.*, *Trustees* v. *Greenough*, 105 U.S. 527 (1882). This doctrine rests on the principle that it would be inequitable to allow the beneficiary class to enjoy the fruits of a lawsuit without contributing to the costs of the litigation.

In recent years Congress also has enacted statutory exceptions to the American Rule. Approximately 150 federal statutes, including the Magnuson-Moss Act, now allow a prevailing plaintiff to receive attorneys' fees from the losing defendant, and another 50 such statutes authorize fees to be awarded to the prevailing plaintiff's counsel from the plaintiff's recovery. See 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* 5-3 to 5-7 (1989).

2. This litigation and the settlement agreement

This litigation was brought under the Magnuson-Moss Act, 15 U.S.C. §§ 2301 *et seq.* The consolidated class action complaints challenged the performance of transmissions in certain lines of GM automobiles (App., *infra*, 21a).

Following extensive preliminary proceedings, the parties entered into a comprehensive settlement agreement. Pursuant to the agreement, GM established a $17 million fund to reimburse the consumer class members for service and repair costs incurred as a result of transmission failure. After giving notice to the class and conducting a fairness hearing, the district court approved the settlement.

The settlement agreement also addressed the issue of attorneys' fees. The Magnuson-Moss Act allows a consumer who "finally prevails" in litigation under the Act to be awarded "as part of the judgment a sum equal to the aggregate amount of cost and expenses (*including attorneys' fees based on actual time expended*) determined by the court to have been reasonably incurred by the plaintiff." 15 U.S.C. § 2310(d)(2) (emphasis added); see page 2, *supra*. In the present case, the settlement agreement provided that attorneys' fees would be paid solely from the settlement fund and would be determined by the court "based on compensation for actual hours spent (the 'lodestar figure')" rather than on a

percentage of the settlement. Settlement Agreement, ¶ 34. The settlement agreement also contained a "reverter" clause that provided that any portion of the settlement fund remaining after the recovery of attorneys' fees and the distribution to plaintiff class members would revert to GM. Settlement Agreement, ¶ 25.

In addition to seeking the lodestar amount, respondent law firms stated their intention to request a "multiplier" payable out of the class settlement fund. GM stated that it would oppose such a claim, and the settlement agreement specifically reserved the parties' right to appeal the court's ruling on the multiplier issue. Settlement Agreement, ¶ 34.

B. Respondents' Claim For Attorneys' Fees And The District Court's Ruling

In response to the request of respondent law firms for a lodestar determination based on time expended and hourly rates, the district court awarded a total lodestar of approximately $2 million in attorneys' fees (plus $680,000 in expenses). This lodestar reflected an allowed total of 12,700 billable hours and an approved hourly rate as high as $240. App., *infra*, 66a-67a, 70a.

Respondent law firms also sought an attorneys' fee "multiplier" of 1.75 times this substantial lodestar amount. The asserted justification for this multiplier was "the contingent nature of the lawsuit and the significant risks undertaken by [the attorneys] in this case" (App., *infra*, 57a). Such a multiplier would have inflated the district court's granted lodestar to $3.5 million. Put differently, this multiplier would have had the practical effect of raising respondent law firms' top rate to $420 per hour or, alternatively, of increasing the total compensable hours to some 22,000—over 9,500 of which were not actually expended but for which respondent law firms nonetheless would be paid.

The district court rejected the request for a multiplier (App., *infra*, 57a-65a). The court first concluded that "the standards for determining reasonable attorneys' fees in common fund cases and statutory fee cases should not be significantly different" (*id.* at 29a). It explained that "the use of statutory fee guidelines to determine a proper fee award is especially relevant" in cases like the present one that are "commenced and prosecuted under a federal statute which specifically provides for an award of attorneys' fees. When parties settle a case involving statutory fees, the amount ultimately awarded should not be dependent upon whether the fees are assessed directly against the defendant, or against a fund created by the defendant" (*ibid.*); see also *id.* at 57a-58a.

The district court thus determined that the congressional policy underlying the attorneys' fee limitation in the Magnuson-Moss Act was fully applicable to the respondent law firms' request for a multiplier (App., *infra*, 57a-58a):

> [E]ven if the fee award is based on the common fund doctrine, any limitation contained in the Magnuson-Moss Warranty Act is a relevant consideration in determining whether to award a "risk" multiplier in this case. The structure of the settlement agreement should not divert the court from the Congressional intent underlying the passage of this Act.

Finding that "Section 2310(d)(2) evinces a Congressional intent to limit the fee award to the time actually expended in pursuit of a plaintiff's claim," the court held that "a plaintiff in a Magnuson-Moss case is not entitled to an upward multiplier adjustment of the fees awarded" (*id.* at 58a).

In addition, the district court ruled that no multiplier was justified under general attorneys' fee principles.[1]

[1] The court's ruling was issued prior to, but anticipated, this Court's decision in *Delaware Valley II*.

The court noted that the lodestar computed from reasonable time and rate figures " 'is *presumed* to be the reasonable fee' " (App., *infra*, 60a-61a (emphasis in original), quoting *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984)). Moreover, " '[t]he novelty and complexity of the issues' " —which constitute the principal reasons for the riskiness of the litigation (see *Delaware Valley II*, 107 S. Ct. at 3087)—" 'presumably were fully reflected in the number of billable hours recorded by counsel' " and therefore are not " 'appropriate factor[s] in determining whether to increase the basic fee award' " (App., *infra*, 61a, quoting *Blum*, 465 U.S. at 898). As the court explained (App., *infra*, 44a-45a, 64a), its lodestar calculation had taken

> into account all relevant factors, including * * * the skill and the difficulty of the legal work completed, * * * [the] results obtained, * * * and the contingency of the fee.
>
> * * * * *
>
> The attorneys' fees that this court has included in its calculation of the lodestar amounts * * * adequately compensate[] these firms for the "risk" involved in prosecuting this case.

In rejecting the requested multiplier, the district court heeded this Court's admonition that attorneys' fees are not " 'a form of economic relief to improve the financial lot of attorneys' " but instead serve " 'to enable private parties to obtain legal help in seeking redress for injuries' " (App., *infra*, 62a, quoting *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*")). While "mindful of the chilling effect on future consumer class actions that might result from failure to adequately compensate counsel for their efforts in this litigation" (App., *infra*, 45a), the court found that the lodestar constituted a fully adequate attorneys' fee and that "an upward multiplier of the basic lodestar fees is neither necessary nor appropriate" (*id.* at 64a).

C. The Court Of Appeals' Ruling And The District Court's Decision On Remand

In an opinion by Judge Cudahy, the Seventh Circuit reversed the district court's multiplier ruling (App., *infra*, 1a-20a). The court of appeals did not dispute the substantial objections voiced in the opinions of this Court (including the recent *Delaware Valley II* decision) to awards of multipliers under fee-shifting statutes. In cases governed by fee-shifting statutes, the court acknowledged, there are "stringent requirements for awarding [multipliers]" (*id.* at 7a).

The court of appeals concluded, however, that this case, although brought under the Magnuson-Moss Act, was governed by equitable common fund principles rather than the Act's express fee-shifting provision because the attorneys' fees would be paid from a settlement fund. In the court's view, "when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees" (App., *infra*, 12a). For this reason, "the fee-shifting provision of the Magnuson-Moss Act should [not] affect the fee determination in this case, which was settled, resulting in a common fund" (*id.* at 9a).

Having concluded that the present case is governed by equitable common fund principles rather than the Magnuson-Moss Act's fee provision, the court of appeals next determined that "equitable fund principles allow for an upward adjustment of the lodestar" (App., *infra*, 10a). Such a multiplier was justified, the court stated, because "at least in the common fund context, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose" (*id.* at 8a). Under this approach, the court indicated that a multiplier of two—that is, a 100% increase over the lodestar—would generally be appropriate (*id.* at 16a).

Although it held that the concerns raised by risk multipliers under fee-shifting statutes are not applicable in the common fund context, the court of appeals was forced to concede that those same concerns rendered it "difficult[]" to determine the magnitude of any multiplier (App., *infra*, 15a). "This task," the court stated, "is not without its problems" (*id.* at 16a). Nevertheless, and without providing any standard to guide the inquiry, the court of appeals remanded the case to the district court to "assess the riskiness of [this] litigation" in order "to account for the contingent-nature of the compensation" (*ibid.*).

Pursuant to the court of appeals' mandate, the district court, after conducting further proceedings on the issue of the risk multiplier, reversed its prior decision and approved a multiplier of 1.6 (App., *infra*, 69a-72a). This resulted in an effective increase in the maximum hourly billing rate from $240 to approximately $385 or, stated otherwise, an enhancement of the total compensable hours from 12,700 to more than 20,300. As a consequence, respondent law firms were awarded a bonus of $1.2 million for commencing and settling a "risky" lawsuit—a bonus that will be extracted from the pockets of the consumer class members.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS RESOLVED A RECURRING AND IMPORTANT ATTORNEYS' FEE QUESTION IN A MANNER THAT CONFLICTS WITH PAST DECISIONS OF THIS COURT AND WITH STATUTORY STANDARDS PRESCRIBED BY CONGRESS

A. The enormous practical importance of attorneys' fee issues for the legal system can hardly be questioned. Congress has enacted some 200 attorneys' fee statutes (see page 4, *supra*), and attorneys' fee litigation has become a virtual cottage industry for lawyers. In recog-

nition of the great public significance of these issues, this Court has repeatedly granted review in attorneys' fee cases in recent years.[2] The decision below—which effectively renders class action settlements creating monetary funds "a form of economic relief to improve the financial lot of attorneys" (*Delaware Valley I*, 478 U.S. at 565)—pointedly demonstrates the critical need for this Court's continued supervision.

To date, this Court has struggled to restrain the centrifugal forces that produce large awards of attorneys' fees and to conform fee awards to the needs of the litigation system. In particular, the Court's decisions have recognized that risk multipliers present "a wide variety of problems" and create "'perverse penalt[ies]'" and undesirable incentives for "'marginal litigation'" (*Delaware Valley II*, 107 S. Ct. at 3083). In addition, because risk multipliers entail substantial "difficulties in administration" (*id.* at 3087) and require "protracted, complicated and exhausting" proceedings (*id.* at 3085), their use is contrary to the Court's admonition that fee disputes "should be simplified to the maximum extent possible" (*ibid.*) and "should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

It is now well settled that the lodestar, "the 'product of reasonable hours times a reasonable rate[,]' normally provides a 'reasonable' attorneys' fee." *Blum* v. *Stenson*, 465 U.S. 886, 897 (1984), quoting *Hensley*, 461 U.S. at 434; see also, *e.g.*, *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989). There is a "strong presumption" that the lodestar figure provides adequate compensation (*Delaware*

[2] See, *e.g.*, the following decisions and the cases cited therein: *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 109 S. Ct. 1486 (1989); *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989); *Delaware Valley II*, *supra*; *Delaware Valley I*, *supra*; *Riverside* v. *Rivera*, 477 U.S. 561 (1986); *Blum* v. *Stenson*, 465 U.S. 886 (1984); *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983).

Valley I, 478 U.S. at 565). In all but the rarest and most exceptional case (see *ibid.*), "the lodestar figure includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" and "leaves very little room for enhancing the award" (*id.* at 566).

In *Delaware Valley II*, this Court specifically held that a multiplier to the reasonable lodestar fee is unavailable to reflect the "risk" that the plaintiff might not have prevailed in the litigation. The only suggested exception to this governing principle is if "the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market'" (107 S. Ct. at 3091 (O'Connor, J., concurring in part and concurring in the judgment))—an exception that the court below did not even purport to rely upon. Significantly, *none* of the Justices in *Delaware Valley II* would have upheld a multiplier of the sort allowed by the Seventh Circuit here based on the perceived riskiness *of the particular lawsuit*. See *id.* at 3089 (plurality opinion of White, J.); *id.* at 3091 (O'Connor, J., concurring); *id.* at 3097-3098 (Blackmun, J., dissenting).

The decision below is a patent evasion of *Delaware Valley II*. While this Court has recognized that fee awards are not designed to provide "economic relief" for attorneys or to "replicate exactly the fee an attorney could earn through a private fee arrangement with his client" (*Delaware Valley I*, 478 U.S. at 565),[3] the court of appeals reasoned that multipliers are justified to enable lawyers to "make up in compensation in the cases

[3] See also, *e.g.*, *Blanchard* v. *Bergeron*, 109 S. Ct. at 945 ("we have not accepted the contention that fee awards in § 1983 damages cases should be modeled upon the contingent fee arrangements used in personal injury litigation"); *Riverside* v. *Rivera*, 477 U.S. at 578 n.9 (plurality opinion of Brennan, J.) ("Congress clearly rejected the notion that attorney's fees under § 1988 should be based on private-sector fee arrangements").

they win for the lack of compensation in the cases they lose" and to reproduce "exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success" (App., *infra*, 8a, 16a). While the plurality and concurring opinions in *Delaware Valley II* concluded that the lodestar "is flexible enough to account for great variation in the nature of the work performed in, and the challenges presented by, different cases" (*Delaware Valley II*, 107 S. Ct. at 3091 (O'Connor, J., concurring)), and that multipliers are "superfluous" and lead to "windfall[s]" for lawyers (*id.* at 3087 (plurality opinion)), the court of appeals declared that multipliers over and above the lodestar are routinely necessary to yield reasonable attorneys' fees. And while this Court has emphasized that multipliers are "a particularly uncertain matter" to assess (*id.* at 3085) and result in "inequities" and administrative "difficulties" (*id.* at 3087 (plurality opinion)), the court of appeals swept aside all of these practical objections.

The Seventh Circuit's decision thus turns established attorneys' fees principles on their head. In effect, the court of appeals, precisely contrary to *Delaware Valley II*, created a strong presumption—if not an outright rule—in favor of multipliers to compensate counsel for the riskiness of class actions that result in a monetary settlement. Since complex litigation (particularly class action litigation) always involves some significant risk of loss, the court of appeals' theory routinely would require risk multipliers. See *Delaware Valley II*, 107 S. Ct. at 3086 (plurality opinion) ("[b]ecause it is difficult ever to be completely sure that a case will be won, enhancing fees for the assumption of the risk of nonpayment would justify some degree of enhancement in almost every case").

This concern is not speculative or hypothetical. The district court in this very case, applying the court of appeals' decision on remand, felt obliged to reverse its orig-

inal determination and to approve a substantial 1.6 multiplier. This decision increased the fee award payable out of the settlement fund from $2 million to $3.2 million, which correspondingly diminished the funds available to consumer class members.[4]

B. The court of appeals sought to avoid *Delaware Valley II* by seizing on the fact that the attorneys' fees in this case, unlike in *Delaware Valley II*, would be payable from a settlement fund financed solely by the defendant, rather than directly from the defendant's purse under a fee-shifting statute. In the court's view, the settlement transformed a fee-shifting case into a common fund case, and as a result both *Delaware Valley II* and the policies of Congress governing attorneys' fee awards became completely irrelevant.

The critical question—and the question never answered by the court of appeals—is why? Why should *Delaware Valley II* be rendered entirely inapplicable in this context? Why should the limitations carefully fashioned by Congress in the attorneys' fee provision of the Magnuson-Moss Act (and in numerous other statutes)—under which a multiplier would clearly have been barred if this case had proceeded to trial (see page 22, *infra*)—suddenly drop out of this case simply because the parties reached a pretrial settlement that produced a monetary fund? Why should the adverse consequences of multipliers for the judicial system, which both this Court and Congress have recognized, be suffered whenever a monetary settlement is negotiated?

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[4] The court of appeals' decision, while by no means limited to the Magnuson-Moss Act, is especially wrong in cases arising under that statute, which makes explicit Congress's intention that reasonable attorneys' fees be "based on actual time expended" (15 U.S.C. § 2310(d)(2)). This express and unambiguous statutory language conclusively demonstrates that multipliers are inconsistent with congressional policy. See page 22, *infra*.

As we discuss in the next section of this petition, the court of appeals' ruling cannot be reconciled with the decisions of this Court and the attorneys' fee statutes enacted by Congress. That erroneous ruling, if allowed to stand, will encourage the filing of marginal cases as a kind of lottery for plaintiffs' counsel seeking a bonanza of fees if they manage to negotiate a settlement. What is more, by giving plaintiffs' counsel a powerful incentive to settle cases regardless of the best interests of the class, the court of appeals' decision will create a severe conflict between class counsel and their clients. Finally, the decision below will inevitably generate an ongoing spate of complex and time-consuming fee disputes—disputes that are entirely collateral to the underlying controversy between the parties, and for which the court of appeals provided no meaningful standards or guidance. Such harmful consequences were not tolerated in *Delaware Valley II*, and they should not be tolerated here.

Indeed, the practical significance of the present case is even greater than that of *Delaware Valley II*. The overwhelming majority of cases in civil litigation are resolved by settlement.[5] If a class action settlement resulting in the creation of a damages fund is all that is necessary to escape the "stringent requirements" (App., *infra*, 7a) of *Delaware Valley II*, the applicability of that decision will be severely limited, and this Court's effort to restrain runaway attorneys' fee multipliers will be largely nullified.

C. Other circuits, contrary to the decision below, have given full effect to *Delaware Valley II* by rejecting risk multipliers in class action settlements resulting in the

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[5] See Federal Judicial Center, *Settlement Strategies for Federal District Judges* 7 (1986) (noting that the "vast majority" of civil cases in federal court terminate by settlement and that the proportion of cases resolved by settlement has steadily increased in recent years). Accord Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U.L. Rev. 542, 545 (1980).

creation of monetary funds. For example, in *Norman* v. *Housing Authority of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988), the Eleventh Circuit held that class counsel was *not* entitled to a multiplier after the case had been settled for $1 million in damages; noting that *Delaware Valley II* allowed an enhanced award "only where it is shown that such enhancement is necessary to assure the availability of counsel" (*id.* at 1302), the court denied a multiplier because "the record is absolutely devoid of any evidence that would suggest that enhancement over the [lodestar] rates requested is necessary to attract competent counsel into the field" (*id.* at 1306). Likewise, in *Student Pub. Int. Res. Group* v. *AT & T Bell Lab.*, 842 F.2d 1436, 1451-1452 (3d Cir. 1988), the Third Circuit held that a requested "contingency multiplier would present vast administrative problems" and denied any post-settlement fee enhancement under *Delaware Valley II*. Accord *Schwartz* v. *Novo Industri A/S*, 119 F.R.D. 359 (S.D.N.Y. 1988).

In order for fee-shifting statutes to serve their legitimate purposes without imposing undue costs on the judicial system, there is a compelling need to dispel this disagreement concerning *Delaware Valley II*, particularly in cases that terminate by settlement—by far the most common disposition of class action suits in federal court. Federal district courts, which face extraordinary burdens in administering class actions and in reviewing and approving settlements, are in need of further guidance from this Court.[6]

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[6] See, *e.g.*, *In re PSFS Sec. Litig.*, No. 85-4978, n.8 (E.D. Pa. Nov. 30, 1987) (available on LEXIS, Genfed library, Courts file) ("[i]t is not clear whether [the *Delaware Valley II* limitations] also apply to this [multiplier] factor in common fund cases"); *In re Wicat Sec. Litig.*, 671 F. Supp. 726, 738 (D. Utah 1987) (stating that *Delaware Valley II* "may raise more questions than it answers"); *Garmong* v. *Montgomery County*, 668 F. Supp. 1000, 1008 (S.D. Tex. 1987) (expressing confusion over the scope of *Delaware Valley II*).

The Seventh Circuit's holding that *Delaware Valley II* has no application to monetary settlements will be relied on not only in cases brought under the Magnuson-Moss Act, but also in class action suits brought under a host of other federal fee-shifting statutes, most of which result in settlement and the creation of a "common fund" for the plaintiff class. In these circumstances, this Court's intervention is necessary to prevent wide-spread circumvention of *Delaware Valley II* and to protect the federal judicial system from the burdens and dislocations caused by claims for "multipliers" of attorneys' fees.

II. THE COURT OF APPEALS' HOLDING THAT RISK MULTIPLIERS ARE AVAILABLE WHEN CLASS ACTION SETTLEMENTS RESULT IN THE CREATION OF A MONETARY FUND IS PLAINLY IN ERROR AND SHOULD BE REVERSED

The Seventh Circuit did not and could not deny that *Delaware Valley II*, if applicable to this case, would preclude the risk multiplier that the court authorized. Under *Delaware Valley II*, "any enhancement [of the presumptively reasonable lodestar fee] based on 'legal' risks or risks peculiar to the case" is impermissible (107 S. Ct. at 3091 (O'Connor, J., concurring)); see page 11, *supra*. As the plurality noted, such risk enhancement "result[s] not in a 'reasonable' attorney's fee, but in a windfall for an attorney who prevailed in a difficult case" (*id.* at 3087).

The court of appeals reasoned, however, that negotiation of a monetary settlement for the plaintiff class takes the case out of the attorneys' fee provision of the Magnuson-Moss Act under which it was being litigated and therefore out of the principles of *Delaware Valley II*. In that situation, according to the court below, this Court's rationale in *Delaware Valley* II and the policies of Congress are completely beside the point, and the case is controlled by an entirely different legal standard based on the equitable "common fund" doctrine.

But the decisions of this Court and the enactments of Congress cannot be so easily swept aside. As we now show, there is no reasoned basis for the court of appeals' broad exemption of class action settlements from the prohibition that would otherwise apply under federal fee-shifting statutes to risk multipliers. The law cannot sensibly distinguish between settled and litigated cases for purposes of awarding risk bonuses or lavishly reward plaintiffs' counsel for bringing and settling "risky" cases.

A. *Delaware Valley II* rested on this Court's recognition that risk multipliers under fee-shifting statutes lead to harmful results that cannot be squared with the requirements of sound judicial administration or the intention of Congress. Contrary to the court of appeals' belief, risk multipliers in class action settlements are subject to precisely the same objections.

To begin with, this Court in *Delaware Valley II* emphasized that a risk multiplier substantially duplicates elements of compensation that already are included in the lodestar:

> The reasons a particular lawsuit [is] considered to be "risky" for an attorney are because of the novelty and difficulty of the issues presented, and because of the potential for protracted litigation. Moreover, when an attorney ultimately prevails in such a lawsuit, this success will be primarily attributable to his legal skills and experience, and to the hours of hard work he devoted to the case. These factors, however, are considered by the court in determining the reasonable number of hours expended and the reasonable hourly rate for the lodestar, and *any further increase in this sum based on the risk of not prevailing would result not in a "reasonable" attorney's fee, but in a windfall for an attorney who prevailed in a difficult case.*

107 S. Ct. at 3087 (plurality opinion) (emphasis added); see also *id.* at 3089 (O'Connor, J., concurring). Whether

a case is tried or settled, the elements of the lodestar calculation—reasonable hours and reasonable hourly rates —are the same. If, as *Delaware Valley II* held, the use of a risk multiplier confers an unconscionable windfall on attorneys in a case that goes to trial, settlement obviously cannot transform that windfall into a "reasonable" attorneys' fee.

Similarly, the use of risk multipliers to calculate fee awards produces the "highest fees in cases least likely to be won" (*Delaware Valley II*, 107 S. Ct. at 3086 (plurality opinion)). That perverse result encourages marginal litigation and tends to "attract competent counsel away from prosecuting clear violations of rights in favor of cases with a higher potential award." Rader, *The Fee Awards Act of 1976: Examining the Foundation for Legislative Reform of Attorney's Fees Shifting*, 18 J. Marshall L. Rev. 77, 105 (1984). In this way, risk multipliers—wherever used—run directly counter to Congress's primary purpose of encouraging suits that vindicate the core policies of federal law.

In addition, risk enhancement, which "compensate[s] plaintiff's lawyers for not prevailing against defendants in other cases[,] * * * is not consistent with Congress' decision to adopt the rule that only prevailing parties are entitled to fees" (*Delaware Valley II*, 107 S. Ct. at 3086 (plurality opinion)). This Court's reasoning cannot be squared with the court of appeals' announced objective of enabling plaintiffs' attorneys to "make up in compensation in the cases they win for the lack of compensation in the cases they lose" (App., *infra*, 8a). If it is unfair to require defendants in fee-shifting cases to subsidize plaintiffs' attorneys for unsuccessful litigation elsewhere, it is equally unfair to impose that burden on the plaintiff class in monetary settlements.

Finally, the court of appeals' ruling leads to irrational distinctions in the cases in which attorneys' fee multipliers can be awarded. For instance, *Delaware Val-*

ley II consistently has been applied to class action settlements involving equitable relief. See, *e.g.*, *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d 43, 53 (D.C. Cir. 1987) ("[s]ince the district court in this case based its award of a non-payment multiplier on * * * the court's assessment of the difficulty and risk unique to this case, *Delaware Valley II* compels us to reverse the district court's [post-settlement] award of a 10% risk multiplier"), vacated in part on other grounds, 857 F.2d 1516 (1988) (en banc); accord *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987). However, under the Seventh Circuit's rationale, if an identical class action results in a settlement creating a monetary fund, class counsel could claim a risk-enhanced fee. Congress clearly could not have intended such an arbitrary result. As this Court recently has observed, federal fee-shifting statutes "make[] no distinction between actions for damages and suits for equitable relief" (*Blanchard* v. *Bergeron*, 109 S. Ct. at 945).

B. The court of appeals' decision also creates an intolerable conflict of interest between counsel and the class. Under a fee-shifting statute, if a class action is tried on the merits and a favorable judgment is secured, the class would recover an award of damages unreduced by any attorneys' fees, and class counsel would receive payment from the losing defendant at the ordinary lodestar rate. Under the Seventh Circuit's common fund rationale, by contrast, a pretrial settlement would justify a large multiplier, and the entire award of fees would be borne by the plaintiff class. From the vantage point of class counsel, the fact that a multiplier is routinely available following settlement—but is *not* available if the case proceeds to trial—creates a powerful temptation to settle cases regardless of the best interests of the class. The multiplier places overwhelming economic pressure on class counsel to settle even though a larger judgment could be obtained at trial, and even though attorneys'

fees in the settled case would come out of the plaintiffs' pockets rather than from the defendant.

The court of appeals offered no justification for pitting class counsel against the class in this fashion. Furthermore, it is simply illogical to construe *Delaware Valley II* to protect defendants who are adjudged to be violators of federal statutes from having to pay "risk multipliers," while exposing plaintiffs—who are the beneficiaries of these statutes and the intended recipients of any settlement fund—to significant reductions in their recoveries in order to pay an enhanced attorneys' fee.

Contrary to the court of appeals' assumption, "equitable principles" inherent in the "common fund" doctrine do nothing to justify this glaring conflict between class counsel and the class members. The "common fund" doctrine rests on the equitable principle that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee" and that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 478 (1980). In contrast to such a "reasonable" fee, which is already reflected in the lodestar, a risk multiplier represents a "windfall." Thus, the court of appeals' decision is entirely unnecessary to prevent the unjust enrichment of absent class members: it serves only to confer a lavish bonus on class counsel that is duplicative of the lodestar award. That bonus constitutes unjust enrichment of counsel at the expense of their class-member clients.

The court of appeals also was plainly wrong in suggesting (see App., *infra*, 6a-7a) that its decision will have no impact on defendants. The court ignored the fact that improper attorneys' fee awards can deprive defendants of the benefit of settlement agreements.

Defendants have a strong interest in seeing that the proceeds of a settlement go to the plaintiffs rather than the plaintiffs' attorneys. Here, for example, GM sought to ensure that the class members would receive the maximum benefit of the settlement and that any excess amount would revert to GM rather than accrue to respondent law firms. Accordingly, GM expressly reserved its right to challenge any request for a risk multiplier on the ground that such a bonus was not authorized by law. See page 5, *supra*. The upshot of the court of appeals' multiplier ruling is that, while GM paid millions of dollars to reach an amicable resolution of this suit and promote its goodwill with past and prospective customers, an additional $1.2 million now has been diverted from the intended beneficiaries to class counsel.

C. In the final analysis, the court of appeals' decision rests heavily on a policy judgment that the private market model should govern attorney compensation in class actions. As the court below candidly acknowledged, its risk-enhancement requirement replicates the private market by compensating class counsel in "the way a plaintiff's attorney may be compensated by a contingent fee" (App., *infra*, 4a); by effectively compensating counsel for the cases they lose as well as the ones they win, the multiplier provides "exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success" (*id.* at 16a). However, this Court consistently has rejected the proposition that the private market model should govern the determination of "reasonable attorneys' fees" under federal fee-shifting statutes (see page 11 & note 3, *supra*). Instead, fees should provide "reasonable compensation, in light of all of the circumstances, for the *time* and *effort* expended by the attorney for the prevailing plaintiff, *no more and no less*" (*Blanchard* v. *Bergeron*, 109 S. Ct. at 944 (emphasis added)). Since Congress has not permitted such multipliers, it plainly was inappropriate for the court of appeals to do so under judge-made "equity" principles.

Nowhere is the clash between the court of appeals' common fund theory and the congressional policy underlying federal fee-shifting provisions more pronounced than in class actions brought under the Magnuson-Moss Act. The Act allows a court to award a prevailing plaintiff reasonable attorneys' fees "based on actual time expended" (15 U.S.C. § 2310(d)(2) (emphasis added)). This language plainly evidences Congress's intent to limit fee awards to the reasonable lodestar—a determination that squarely forecloses a risk multiplier over and above the lodestar.[7]

The court of appeals attempted to skirt this unambiguous congressional objective by asserting that "[b]ecause a risk enhancer is applicable to the lodestar—it multiplies the lodestar by a number representing the probability of loss—it is based on the number of hours the attorneys worked and * * * [therefore] is 'based on actual time expended'" (App., *infra*, 14a). But the court's strained effort to reconcile its decision with the statutory language is unavailing. By no stretch of the English language can the phrase "based on actual time expended" be construed to authorize a *multiplier* of up to *twice* the actual time expended. The Magnuson-Moss fee-shifting provision, which was designed to protect consumers while restraining undeserved awards to counsel, plainly prohibits the use of risk multipliers in litigation commenced under the Act. Certainly nothing in the statute or its history justifies the court of appeals' theory that fees should be awarded to counsel in their successful cases in order to compensate them for their losses in other cases.

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[7] The legislative history reinforces the conclusion that Congress intended to preclude any enhancement of lodestar fees under "common fund" principles. See S. Rep. No. 151, 93d Cong., 1st Sess. 24 (1973) ("an attorney's fee is to be based upon actual time expended rather than being tied to any percentage of the recovery"). As this Court explained in *Blum* v. *Stenson*, 465 U.S. at 900 n.16, a "percentage of the fund" generally refers to a "common fund" fee award.

The court of appeals also suggested that, even if the Magnuson-Moss fee-shifting provision prohibits risk multipliers in litigated cases, it does not apply to settlements. The court stated that it was unable to find "any evidence in the legislative history of Congress' intent to apply the fee-shifting provision to common fund or settlement cases of any kind" (App., *infra*, 12a).

The court of appeals could not find this evidence because it looked to the wrong legislative materials.[8] In fact, the legislative history of the Magnuson-Moss Act makes clear that Congress intended the fee-shifting provision to apply to settlements. See S. Rep. No. 151, 93d Cong., 1st Sess. 22-23 (1973) ("[a] purchaser * * * may resort to formal adversary proceedings with reasonable attorney's fees available if successful in the litigation (*including settlement*)") (emphasis added). This understanding comports with the general rule that the applicability of fee-shifting provisions is *not* conditioned on "full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). See also *Friends of the Earth* v. *Eastman Kodak Co.*, 834 F.2d at 297; *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 826 F.2d at 46. Thus, the court of appeals plainly erred in importing into the statute a novel "adjudication-on-the-merits" requirement in an attempt to justify an otherwise impermissible fee multiplier.

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[8] The court below considered the legislative history of a predecessor (S. 986, 92d Cong., 1st Sess. (1971)) to the bill that eventually was passed into law (S. 356, 93d Cong., 1st Sess. (1973)). See S. Rep. No. 151, 93d Cong., 1st Sess. 5-6 (1973). In so doing, it ignored the subsequent history of the enacted bill that specifically recognized the applicability of the attorneys' fee provision to cases that are settled.

III. REVIEW IS WARRANTED AT THIS TIME

The foregoing discussion demonstrates that the attorneys' fee question decided by the Seventh Circuit merits this Court's review. And for the same reasons, review is warranted at this time. Under the mandate of the court of appeals, the district court has now approved a 1.6 multiplier. The court of appeals' decision thus has resulted in a complete reversal of the district court's final judgment and a substantial increase in the attorneys' fee award.

More generally, the court of appeals has held as a matter of law that a risk multiplier is available to compensate class action lawyers whose settlements create a monetary fund. The court's holding finally disposes of that legal issue, and it is that holding that is flatly inconsistent with this Court's decision in *Delaware Valley II* and with Congress's controlling policy. It is that holding that will sow confusion for courts and litigants alike under a wide variety of attorneys' fee provisions. And it is that holding that will increase the incentive for plaintiffs' attorneys to clog the courts with marginal lawsuits in the hope of recovering large multipliers, while spawning complex litigation over the collateral issue of attorneys' fees.[9]

Indeed, the court of appeals itself recently followed and expanded the decision below in *McGuire* v. *Sullivan*, No.

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[9] The court of appeals' decision already has been followed in other cases. See *In re Public Service Co. of Ind. Derivative Litig.*, Nos. IP-84-219-C and IP-84-358-C (S.D. Ind. Dec. 22, 1988) (awarding a risk multiplier of 1.55 to class counsel after settlement of a derivative suit resulting in a common fund); *In re Churchfield Mgt. & Inv. Corp.*, No. 84 B 7409 (Bankr. N.D. Ill. Mar. 7, 1989) (awarding a risk multiplier of 1.5 to two law firms in a bankruptcy class action resulting in a common fund); see also *Dutchak* v. *International Brotherhood of Teamsters*, Nos. 76 C 3803, 78 C 342, and 79 C 1725 (N.D. Ill. Apr. 6, 1989) (noting that the court of appeals in *Skelton* had "addressed favorably" risk multipliers in common fund cases).

88-1097 (7th Cir. Apr. 24, 1989). That case involved claims for disability benefits under the Social Security Act, which (like some 50 federal statutes, see page 4, *supra*) allows an award of a reasonable attorneys' fee payable out of the plaintiff's recovery. The federal government specifically argued that the principles of *Delaware Valley II* were applicable and precluded a risk multiplier even though the fees would be paid by the claimant rather than by the losing party; as it stated, "[t]he source of payment has nothing to do with the issues of fairness, attorney fee windfalls, and the unpredictable results addressed in *Delaware Valley II*" (Appellant's Br. 24). The Seventh Circuit rejected that argument, holding that a multiplier is authorized and citing its decision here for the broad proposition that "the lodestar may be enhanced for contingency" (slip op. 8; see also *id.* at 11). As a result, attorneys' fee multipliers—which constitute a windfall entirely unrelated to a lawyer's reasonable efforts expended in representing a client—will now be available to greatly reduce the statutory benefits of Social Security recipients.

In sum, further delay in resolving this critical legal question would serve only to subject the legal system to precisely the same undesirable consequences that this Court sought to avoid in *Delaware Valley II*. The court of appeals erred by initiating a "second major litigation" over the multiplier issue (*Hensley* v. *Eckerhart*, 461 U.S. at 437). This Court can bring this already protracted litigation to a close by reversing the court of appeals' decision and reinstating the original ruling of the district court, which properly awarded the $1.2 million in controversy to the consumer class members rather than to respondent law firms.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 974-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
KAREN C. LIEBERMAN
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Petitioner

MAY 1989

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 87-1404, 87-1530 and 87-1610

ARLIE GLEN SKELTON, et al., on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLANTS

v.

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE

Appeals of: Sachnoff, Weaver & Rubenstein, Ltd. and Law Offices of Beverly C. Moore, Jr.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 79 C 1243, 80 C 2151, and 85 C 4805—
John A. Nordberg, *Judge*

ARGUED JANUARY 13, 1988—DECIDED OCTOBER 14, 1988

Before BAUER, *Chief Judge*, and CUDAHY and COFFEY, *Circuit Judges*.

CUDAHY, *Circuit Judge*. This case arises out of a series of class actions brought against General Motors Corporation ("GM") for allegedly substituting less efficient engines and various other automotive parts (including transmissions) into certain lines of GM automobiles. The suits, brought in Illinois, New York and Washington, D.C., culminated when the consolidated class filed a complaint against GM in 1982 (for substituting less efficient transmissions in several lines of GM automobiles), under the Magnuson-Moss Warranty-Federal Trade Im-

provement Act, 15 U.S.C. §§ 2301-2312 (the "Magnuson-Moss Act"). The plaintiffs successfully petitioned the court for class certification and then settled with GM in 1985. Pursuant to the settlement, GM agreed to establish a $17 million fund to be distributed among the plaintiffs whose cars were affected by the substitution. As part of the settlement, the plaintiffs agreed that the fund would be the sole source of their attorneys' fees and that the fees would be calculated on an hourly rather than on a percentage-of-the-fund basis.

Class counsel submitted fee petitions based on the hours they expended multiplied by their hourly rate of payment. Counsel also requested a 75% enhancement of their fee awards to compensate for the risks undertaken in commencing this litigation. In denying the enhancement, the district court reasoned that the determination of a fee award under common fund principles is not significantly different than under a statutory fee-shifting provision. Thus, the district court held that the fee-shifting provision of the Magnuson-Moss Act is relevant to the award of fees in this case and that, under that provision, counsel are not entitled to an upward multiplier. The court alternatively concluded that, even if the Magnuson-Moss Act does not preclude the award of a multiplier, plaintiffs' counsel in this case are not entitled to a risk multiplier because the litigation never progressed beyond class certification.

I.

The issue presented by this case is whether the principles governing the shifting of attorneys' fees as between a plaintiff and a defendant are equally applicable to the division of a common fund recovery between a plaintiff class and its attorneys. The district court reasoned

> that the standards for determining reasonable attorneys fees in common fund cases and statutory fee

> cases should not be significantly different. In the court's view, the use of statutory fee guidelines is especially relevant where the litigation is commenced and prosecuted under a federal statute which specifically provides for an award of attorneys' fees.

Skelton v. General Motors Corp., 661 F. Supp. 1368, 1375-76 (N.D. Ill. 1987) (footnote omitted). But there are a number of reasons, based on the development of the respective doctrines and on the logic of the two problems, why these questions must be viewed separately. The factors which separate them are much more significant than those that link them.

Traditionally in the United States, parties to a lawsuit bear their own expenses. Thus, each litigant must pay its own attorneys' fees without regard to the outcome of the litigation. This has become known as the "American Rule." By contrast, for centuries British statutory authority has allowed an award of fees and costs to the prevailing party. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-64 (1975) (thoroughly discussing the history and present status of attorney fee awards). The American Rule continues to govern most of the cases in this country. However, there are many cases where the court may determine not only the amount of fees but which party shall pay them, based on statutory requirements or equitable doctrines. In some of these cases the court's determination may take the place of, supersede or modify fee agreements between a party and its counsel.

For example, Congress has created exceptions to the American Rule by inserting fee-shifting provisions in certain statutes. *See, e.g.*, 15 U.S.C. §§ 78i(e), 78r(a) (Securities Exchange Act of 1934); 15 U.S.C. § 1640(a) (Truth in Lending Act); 15 U.S.C. § 2310(d)(2) (Magnuson-Moss Act); 42 U.S.C. § 7604(d) (Clean Air Act); 42 U.S.C. § 2000a-3(b) (Civil Rights Act of 1964, Title

II); 42 U.S.C. § 2000e-5(k) Civil Rights Act of 1964, Title VII); 42 U.S.C. § 3612(c) (Fair Housing Act). Thus, a plaintiff that prevails in an action brought under a statute with a fee-shifting provision recovers the amount of its attorney's fee from the defendant.

In contrast, when a case results in the creation of a common fund for the benefit of a plaintiff class, a court will exercise its equitable powers to award plaintiffs' attorneys' fees out of the fund. *Alyeska*, 421 U.S. at 257-58. In this type of case, the defendant deposits a specified amount with the court for the benefit of the class in exchange for release of its liability. The attorneys' fee award is then taken as a share of the fund, thereby diminishing the sum ultimately retained by the plaintiff class. Similar to the way a plaintiff's attorney may be compensated by a contingent fee, a plaintiff class pays its attorneys by sharing its recovery with them.

Because there is a difference between statutory fee-shifting cases and common fund cases with respect, *inter alia*, to who bears the direct burden of compensating plaintiffs' attorneys, different policies may govern the two types of cases. The common fund doctrine (also known as the "equitable fund" doctrine and the "fund-in-court" doctrine) is "based on the equitable notion that those who have benefited from litigation should share its costs." Report of the Third Circuit Task Force, Court Awarded Attorney Fees 14 (Oct. 8, 1985), *reprinted in* Appendix of Appellants at 435, 453; *see Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Insurance Co. of N. America v. Norton*, 716 F.2d 1112, 1115-16 (7th Cir. 1983). Statutory fee-shifting provisions, in contrast, reflect the intent of Congress "to encourage private enforcement of the statutory substantive rights, be they economic or noneconomic, through the

judicial process." Report of the Third Circuit Task Force, Court Awarded Attorney Fees 15 (Oct. 8, 1985), *reprinted in* Appendix of Appellants at 454. Defendants who have violated plaintiffs' rights may be required to compensate plaintiffs for the costs incurred in enforcing those rights. Thus, in statutory fee-shifting cases, only parties (usually plaintiffs) may seek reimbursement whereas in common fund cases *attorneys* may seek compensation.

Another difference between the two types of court-awarded fee arrangements concerns the role of the plaintiffs' attorneys. In common fund cases, once the attorneys secure a settlement for the class, they petition the court for compensation from the same fund. Thus, their "role changes from one of a fiduciary for the clients to that of a claimant against the fund created for the clients' benefit." *Id.* at 20, *reprinted in* Appendix of Appellants at 459. The court becomes the fiduciary for the fund's beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing the fee applications. *See In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 583 (3d Cir. 1984) (fee requests from common fund are subject to "heightened judicial scrutiny"). Because statutory fee cases involve the plaintiff (not his attorney) as claimant and continue to be adversary proceedings, these concerns do not arise in the same way.

The district court in this case reasoned, however, that "regardless of any theoretical distinctions between common fund and statutory fee cases, the courts in this circuit employ the same general standards to calculate attorneys fees in both types of cases." *Skelton*, 661 F. Supp. at 1376. To the extent that, in this circuit, both fee arrangements generally require the court to employ the lodestar approach, this observation is correct. *See, e.g., Grekas v. Attorney Registration & Disciplinary Comm'n*, 793 F.2d 846 (7th Cir. 1986) (statutory fee case); *In re Folding Carton Antitrust Litigation*, 84

F.R.D. 245 (N.D. Ill. 1979). However, when a court must decide whether to compensate attorneys for the risks they incurred in undertaking the litigation, the difference between fee-shifting and common fund arrangements is quite significant.

Panels of this court—as well as commentators and other courts—have expressed the concern that awarding risk multipliers to prevailing plaintiffs in statutory fee cases may inequitably burden defendants. For example, risk multipliers tend to penalize the parties with the strongest defenses. The stronger the defense, the higher the risk involved in bringing the suit and the greater the multiplier necessary to compensate plaintiff's attorney for bringing the action. Thus, defendants with better cases pay higher plaintiff's attorney fees. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078, 3083, 3085 (1987); *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986) ("One common concern with compensation for risk is that the multiplier should rise as the probability of success falls, soaking the unlucky defendant who had a good case (more than a 50% chance of prevailing) but lost anyway and therefore faced a huge multiplier."); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 26 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985); Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 488-89 (1981). This consideration does not directly apply in a common fund case. A risk multiplier will not penalize a defendant with a strong defense since the plaintiff class (not the defendant) is responsible for compensating its attorney by sharing its recovery.

Further, assessing risk multipliers against losing defendants in effect requires these defendants to "subsidize" plaintiffs' lawyers for their unsuccessful lawsuits against other defendants. In statutory fee cases, this is "manifestly inconsistent with Congress' intent to award attorney's fees only to prevailing parties." *Delaware*

Valley, 107 S. Ct. at 3083; *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984) ("The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails."); *Laffey*, 746 F.2d at 34 n.138; Leubsdorf, *supra*, at 490. In a common fund case, however, this result cannot directly occur because the specific amount of the fee is charged against the plaintiffs, not the defendant; the defendant's liability is limited to the amount of the common fund, which is available to provide attorneys' fees.[1]

Therefore, the arguments—equitable and statutory—against risk multipliers in statutory fee cases have much less application in common fund cases.[2] This may be the reason that courts awarding fees in common fund cases generally do not express the same reluctance to compensate attorneys for the risk of nonpayment.

Although the Supreme Court has recently rejected the position that risk multipliers are prohibited in statutory fee cases, it has set forth stringent requirements for awarding them. *Delaware Valley*, 107 S. Ct. at 3090-91

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[1] GM argues that the settlement agreement's reverter clause ("Any portion of the settlement fund or accrued interest remaining after the distributions . . . shall revert to General Motors." Settlement Agreement ¶ 25) distinguishes this case from the typical common fund case. We disagree. In all common fund cases, the defendant has at least "a colorable claim" to any unclaimed monies. *See Boeing v. Van Gemert*, 444 U.S. 472, 481 & n.7 (1980). The significant feature that distinguishes common fund cases from statutory fee cases is that, in the former, defendants' potential liability has been limited.

[2] This circuit has also mentioned that risk multipliers provide "an incentive to pursue unmeritorious litigation." *Hagge v. Bauer*, 827 F.2d 101, 111 (7th Cir. 1987); *see also McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984).

(O'Connor, J., concurring in part and concurring in the judgment);[3] *see infra.* In a common fund case, where there is no direct or immediate danger of unduly burdening the defendant, a court has more latitude in exercising its equitable powers to determine whether the plaintiff class should compensate its attorneys for their risk of nonpayment. And it remains arguable that, at least in the common fund context, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose.

Thus, when a case is initiated under a statute with a fee-shifting provision and is settled with the creation of a common fund, the question may arise whether statutory fee principles should govern in whole or in part the attorney fee award. The district court in this case concluded that the fee-shifting provision of the Magnuson-Moss Act should have a significant impact on the determination of the fees awarded in this common fund case. *Skelton*, 661 F. Supp. at 1389. In the same vein, GM argues that because the plaintiffs sought relief under the

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[3] Justice O'Connor agreed with part of the reasoning of the four-vote plurality and with some of the arguments offered by the four-vote dissent. Her position on risk multipliers thus represents the position of a majority of the Court. Justice O'Connor agreed with the plurality that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078, 3091 (1987) (O'Connor, J., concurring in part and concurring in the judgment) (quoting the plurality opinion, 107 S. Ct. at 3089). Justice O'Connor also observed that "'legal' risks or risks peculiar to the case" are not sufficient to warrant an enhancement of the lodestar. *Id.* (citing *Blum v. Stenson*, 465 U.S. 886, 898 (1984)). Thus, Justice O'Connor agreed with the dissent that "compensation for contingency must be based on the difference of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case." *Id.* at 3089.

Magnuson-Moss Act, its fee-shifting provision should control the award of their attorneys' fees. These conclusions are incorrect and insupportable. Neither the Magnuson-Moss Act itself nor cases involving common funds and other fee-shifting statutes lead us to conclude that the fee-shifting provision of the Magnuson-Moss Act should affect the fee determination in this case, which was settled, resulting in a common fund.[4]

When a case results in a common fund, courts generally follow the "equitable fund doctrine" in determining the attorney fee award. *See Van Gemert*, 444 U.S. at 478 ("The common fund doctrine reflects the traditional practice in courts of equity."); F. MacKinnon, *Contingent Fees for Legal Services* 148 (1964) ("payment of fees by the court from a common fund is standard practice in all jurisdictions"). In current practice, the court exercises its equitable powers by first calculating the lodestar, taking into consideration number of hours and how they were spent and the "value of each attorney's services to the class." *In re Fine Paper*, 751 F.2d at 583. Next, the court may adjust the lodestar to reflect the "contingent nature of the attorney's under-

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[4] The Third Circuit Task Force concluded that:

> The traditional common-fund case *and those statutory fee cases that are likely to result in a settlement from which adequate counsel fees can be paid,* should be treated differently than the more typical statutory fee case involving the declaration or enforcement of rights or relatively modest sums of money.

Report of the Third Circuit Task Force, Court Awarded Attorney Fees 21 (Oct. 8, 1985), *reprinted in* Appendix of Appellants at 435, 460 (emphasis added). The Task Force ultimately recommended that whenever a settlement fund is created, attorneys' fees should be awarded on a percentage, rather than on an hourly basis. *Id.* Although there are certainly grounds for believing that a percentage fee arrangement would be more efficient than the current approach (of calculating a lodestar and then determining an enhancer, where appropriate), we will not overturn what seems to have become the accepted method of determining fees in this circuit.

taking."[5] *Id.* This requires the court to assess the "likelihood of success in obtaining a judgment or settlement," as measured at the time the attorney began work on the case. *Id.* Thus, where appropriate, equitable fund principles allow for an upward adjustment of the lodestar.

Even in cases initiated under statutes containing fee-shifting provisions, other circuits have applied common fund principles to determine attorneys' fees when resolution of disputes results in the creation of common funds. *See, e.g., In re Fine Paper*, 751 F.2d 502; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). The Second Circuit, in an antitrust class action that resulted in a $10 million settlement explained that it must use common fund principles to determine attorneys' fees because

> the Clayton Act, which provides for the award of attorneys' fees in civil antitrust suits generally, does not authorize award of attorneys' fees to a plaintiff who does not recover a judgment or who settles his claim with the defendant. . . . The only basis for awarding an attorney's fees in such cases is the equitable fund theory doctrine . . . .

Id. at 468-69 (citations omitted). Recognizing that this doctrine is a part of the federal court's equity jurisdic-

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[5] The Third Circuit also allows an upward adjustment of the lodestar to compensate attorneys for the delay in payment, when litigation extends over several years, and for the quality of the representation. *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 583-84 (3d Cir. 1984). Whether the lodestar should be adjusted to account for any of these factors is not at issue in this case. In any event, a multiplier may not be the best method for compensating attorneys for the superior quality of their work. This should be reflected in the lodestar in the form of a high hourly rate. Delay in payment may be compensated in either of two ways: (1) by using the attorneys' current rates (as the district court did here); or (2) by using historical rates plus a prime rate enhancement. The courts in this circuit generally use current rates. *See Skelton v. General Motors Corp.*, 661 F. Supp. 1368, 1382 & n.18 (N.D. Ill. 1987).

tion, the Second Circuit described its underlying rationale as follows:

> Under this theory claims may be filed not only by a party to the litigation, but also by an attorney whose actions conferred a benefit upon a given group or class of litigants. The underlying principle here is that the members of the group should pay "compensation as was reasonable" above and beyond reimbursement for out-of-pocket expense to the attorney representing their interests.

Id. at 469.

The Third Circuit more recently explained its position in a similar case. *In re Fine Paper* involved a class action brought under the Clayton Act, 15 U.S.C. §§ 15, 26, to enforce the Sherman Act, 15 U.S.C. § 1. The lawsuit was settled and the defendant created a fund "in exchange for [its] release . . . from liability both for damages and for statutorily authorized fees." 751 F.2d at 582. The Third Circuit noted that in settling class actions brought under statutes containing fee-shifting provisions, there are two approaches for awarding plaintiffs' attorneys' fees. A court might take the position that damages to the class must be settled separately. Once a fund is created to compensate the plaintiff class for its damages, the court can "either entertain litigation or consider a separate settlement of the defendant['s] liability for statutory fees." *Id.* at 582. Alternatively, the court may allow a single settlement that releases the defendant from both damage and statutory fee liability. The district court in the present case opted for the latter approach. Although this approach creates a potential conflict of interest between class counsel and class members, who are now competing for the same money, it has the possible advantage of facilitating the settlement of class actions. *Id.* at 582-83. The Third Circuit described this second approach as the "conversion" of a statutory fee case into a common

fund case. *Id.* at 583. Regardless whether we choose to adopt the "conversion" characterization, it is clear that, when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees. *See id.* at 582-84; *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 164-65 (3d Cir. 1973).

Moreover, looking specifically at the Magnuson-Moss Act, the fee-shifting provision, by its terms, does not purport to apply to a fee determination in a case settled in a common fund. The provision provides for the award of attorney's fees as part of the *judgment* if the consumer "finally prevails" in an action brought under the statute.[6] 15 U.S.C. § 2310(d)(2). Nor is there any evidence in the legislative history of Congress' intent to apply the fee-shifting provision to common fund or settlement cases of any kind.[7]

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[6] Section 2310(d)(2) provides:

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such award of attorneys' fees would be inappropriate.

15 U.S.C. § 2310(d)(2).

[7] With respect to the fee-shifting provision of the Magnuson-Moss Act, Congress made only the following remarks:

> Subsection (c) of section 110 provides for the recovery of court costs and reasonable attorney's fees in the event a "purchaser," as defined in Title I, is successful in a suit for breach of an express or implied warranty or service contract obligation. This provision would make it economically feasible for consumers to pursue their remedies in state courts. It should be noted that an attorney's fee is to be based upon actual

Even in cases in which the Magnuson-Moss Act is applicable to the fee award (as it would have been had the plaintiff class won a judgment against GM), the fee-shifting provision does not prevent the court from awarding risk multipliers.[8] The district court recognized that this circuit has in recent years disfavored awarding fee enhancers in statutory fee cases.[9] As we noted above, however, the Supreme Court has since squarely addressed this issue. In *Delaware Valley*, a group of citizens had prevailed in an action under the Clean Air Act, 42 U.S.C. § 7410. Fees were awarded to the plaintiffs (not directly to their attorneys) under the fee-shifting provision of the Act, *id.* § 7604(d). The defendant appealed the district court's enhancement of the fee award to compensate the

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> time expended rather than being tied to any percentage of the recovery. This requirement is designed to make it economically feasible to pursue consumer rights involving inexpensive consumer products. Of course where small claims courts are available, the Committee encourages their use; and to the extent legal representation is not necessary in such courts, attorney's fees would probably not be available.

S. Rep. No. 986, 92d Cong., 1st Sess. 21, 117 Cong. Rec. 39614 (1971).

[8] As noted above, *see supra* p. 4, statutory fee-shifting provides an award to the *plaintiff*. Arguably at least, the arrangements of the plaintiff with its attorneys may differ.

[9] To the extent that this circuit has previously taken a position disfavoring risk multipliers in fee-shifting cases, *see, e.g., McKinnon*, 750 F.2d at 1392, we appear to be withdrawing from that position. *See Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986) ("Increasing hourly rates for risk and delay is one way of restoring the hourly rate a lawyer could obtain from a paying client, and a necessary way when the base of the fees must be the hourly rate."); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 661 (7th Cir. 1985) ("We do not mean to imply that a multiplier for the contingent nature of success is inappropriate when lawyers bear the risk of nonpayment and the delay in payment."). *But see Hagge*, 827 F.2d at 111 (risk of loss is not a basis in this circuit for enhancing lodestar; Supreme Court has yet to decide this issue).

plaintiffs' attorneys for assuming the risk of loss through nonpayment. Justice O'Connor, casting the deciding vote, agreed with the plurality that the circumstances of *Delaware Valley* did not warrant the award of a risk multiplier. She agreed with the dissent, however, "that Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions." 107 S. Ct. at 3089 (O'Connor, J., concurring in part and concurring in judgment).

In light of the *Delaware Valley* decision, we cannot adopt the position that risk multipliers are prohibited in all statutory fee-shifting cases. GM contends, however, that the express language of the fee-shifting provision of the Magnuson-Moss Act prevents courts from awarding fee enhancers. This provision provides that attorneys' fees should be "based on actual time expended." 15 U.S.C. § 2310(d)(2). *See supra* note 6. In our view, these words do not preclude a risk multiplier. Instead, they indicate Congress' intent that attorneys' fees be computed on an hourly basis "rather than being tied to any percentage of the recovery." S. Rep. No. 986, 92d Cong., 1st Sess. 21, 117 Cong. Rec. 39614 (1971). *See supra* note 7. Because a risk enhancer is applicable to the lodestar—it multiplies the lodestar by a number representing the probability of loss—it is based on the number of hours the attorneys worked and not the size of plaintiffs' recovery. Thus a risk multiplier is "based on actual time expended."

II.

Having concluded that plaintiffs' counsel are not precluded from seeking a fee enhancer to compensate for contingency we turn to the question whether under the circumstances of this case they are entitled to the risk multiplier they seek. The district court held that a risk multiplier is unnecessary to fully compensate the attorneys because "the action never proceeded very far beyond the initial pleading stages." *Skelton*, 661 F. Supp. at 1392.

The district court's determination of reasonable attorney fees, including its decision whether to award a risk multiplier, generally is reviewed only for abuse of discretion. *See In re Illinois Congressional Districts Reapportionment Cases*, 704 F.2d 380, 382 (7th Cir. 1983); *Swanson v. American Consumer Indus., Inc.*, 517 F.2d 555, 562 (7th Cir. 1975) ("That abuse of discretion is the general standard for review of trial court awards of attorneys' fees under the 'fund' theory . . . is well established."). We will, however, overturn a fee award that is based on an error of law. *Lynch v. City of Milwaukee*, 747 F.2d 423, 426 (1984); *see also Spanish Action Comm. of Chicago v. City of Chicago*, 811 F.2d 1129, 1134 (7th Cir. 1987).

Here the district court erred in basing its denial of a risk multiplier on the fact that the parties settled at a relatively early stage in the litigation. The point at which plaintiffs settle with defendants (or win a judgment against defendants) is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them. *See In re Fine Paper*, 751 F.2d at 583 (risk should be "measured at the point when the attorney's time was committed to the case"). In the present case (as in all similar cases), the early settlement is reflected in the lodestar-plaintiffs' counsel worked fewer hours than they would have if the case had gone to trial.

Because we conclude that early settlement is an insufficient basis for denying a risk multiplier, we remand this case to the district court to consider whether class counsel are entitled to compensation for incurring the risk of nonpayment.

We fully realize the difficulty of this undertaking. The district court must balance the competing goals of fairly compensating attorneys for their services rendered on behalf of the class and of protecting the interests of the class members in the fund. *See* Comment, *Adjusting At-*

torney Fee Awards Through Multipliers in Antitrust Class Actions, 21 Hous. L. Rev. 801, 812 (1984). Nevertheless, when attorneys' receipt of payment is contingent on the success of the litigation, reasonable compensation may demand more than the hourly rate multiplied by the hours worked, for that is exactly what the attorneys would have earned from clients who agreed to pay for services regardless of success. Thus, to account for the contingent nature of the compensation, a court should assess the riskiness of litigation. This task is not without its problems. First, it entails a retroactive calculation of the probability of success as measured at the beginning of litigation. Second, it places plaintiffs' lawyers in the unseemly position of convincing the court that their clients' case was weak. For these reasons (and others) it has been suggested that a standard risk multiplier be used in all contingent fee arrangements. *See* Leubsdorf, *supra* p. 6, at 511 (suggesting that "lawyers in successful cases receive a fee twice what they would have received from clients whose payment is not contingent on success").

Despite the problems related to subjectiveness inherent in the determinaion of a risk muliplier, the district court, familiar as it is with the nature of the litigation, should retain discretion to decide if and to what extent the plaintiffs' counsel should be compensated for risk. It may be that a doubling of the lodestar would provide a sensible ceiling. It would certainly address the concern that extremely risky cases (those bordering on the frivolous) not warrant extremely large risk multipliers. Since class counsel here have requested an amount less than double their lodestar we need not decide this definitively. Thus, we instruct the district court to examine plaintiffs' attorneys' reasons for asserting that this class action was a risky undertaking and to determine whether these reasons justify the 75% multiplier they seek (or some multiplier less than that).

III.

One of the plaintiff's attorneys, Beverly C. Moore, Jr., appeals the district court's determination of his lodestar award of $396,813.32. GM argues that the settlement agreement, which the court approved in a separate order on the same day that it awarded Moore's lodestar, precludes Moore from seeking appellate review of the court's determination of his lodestar. We agree with GM.

The settlement agreement creates a $17 million fund, from which compensation for plaintiffs' attorneys must be taken. The agreement contains a section that describes in detail how costs and expenses, including attorney fees, were to have been recovered. This section requires plaintiffs' attorneys to file with the district court a petition for fees and costs incurred in the litigation based on compensation for actual hours spent (the "lodestar") and reimbursement for actual costs and expenses. This section further states that "[b]oth parties agree not to seek appellate review of any determination of the lodestar figure or actual costs and expense." Settlement Agreement ¶ 34, Appendix of Appellants at 102.

In direct contradiction of the Settlement Agreement, Moore makes such an appeal. He contends that because he is not a party to the Settlement Agreement, he is not bound by its terms. His claim is two-fold: first, he never signed the agreement; second, the attorneys are not the "parties" to the agreement. We do not accept either argument.

Although Moore was not a signatory to it, his conduct binds him to the agreement. *See Soelzer v. Soelzer*, 382 Ill. 393, 399, 47 N.E.2d 458, 460 (1943) (acts and conduct of adopting parent validated unsigned adoption contract); *Amelco Elec. Co. v. Arcole Midwest Corp.*, 40 Ill. App. 3d 118, 125-26, 351 N.E.2d 349, 354 (1976) (subcontractor who did not sign contract was bound because

he did not object to its terms and acted on it).[10] Pursuant to the settlement agreement, Moore, along with the other attorneys, petitioned the district court for their fees and expenses. Moore joined the other attorneys in participating in the October 30, 1986 fairness hearing on the settlement agreement and in the November 10, 1986 hearing on attorneys' fees, which was a continuation of the fairness hearing. Thus, although Moore never signed the agreement, he followed its procedures. Moreover, Moore never filed an objection to the settlement agreement. And, most important, he tried his case and accepted his award. A party may become bound to a contract by accepting its benefits, even though he did not sign it. *Bi-County Properties v. Wampler*, 61 Ill. App. 3d 799, 805, 378 N.E.2d 311 (1978) ("Conduct, including an acceptance of benefits under a contract, may be sufficient to constitute a ratification binding on the party accepting the benefits as if he had signed the contract."). Clearly, the settlement agreement is a contract. *See Airline Stewards & Stewardesses Assoc., Local 550 v. Trans World Airlines, Inc.*, 713 F.2d 319, 321 (7th Cir. 1983) (a settlement agreement is a "contract and as such the construction and enforcement of settlement agreements are governed by principles of local law applicable to contracts generally"). Moore accepted the benefits of the contract when he cashed his check. He cannot obtain the *quid* of the settlement agreement and avoids the *quo* of foregoing his right to appeal.

We also reject Moore's contention that because the attorneys are not "parties" to the Settlement Agreement, the promise not to seek appellate review does not apply to them. Although the Settlement Agreement defines parties as "plaintiffs and defendant General Motors," Settlement Agreement ¶ 1, Appendix of Appellants at 77, the section governing costs and fees clearly binds the attorneys. Drafted in a less-than-perfect manner, that sec-

[10] The Settlement Agreement provides that Illinois law should govern its construction.

tion uses the term "parties" interchangeably with "plaintiffs' counsel":

> Both *parties* agree not to seek appellate review of any determination of the lodestar figure or actual costs and expenses. Both *parties* reserve the right to seek appellate review of the question whether the Court may grant any multiplier or other enhancement of the lodestar figure . . . . In the event of an appeal by General Motors or the *plaintiffs' counsel* as to the question whether the Court may grant any multiplier . . . *plaintiffs' counsel* may apply to the Court for interim payment of costs and expenses . . . .

Id. ¶ 34, Appendix of Appellants at 102 (emphasis added). Our interpretation of this somewhat confusing paragraph is that plaintiffs' counsel and GM have relinquished their right to appeal the lodestar determination. The intent of the language taken in context seems to be to preserve the right of General Motors or of plaintiffs' counsel (the two who apparently had an expressed interest) to challenge on appeal a holding that there could be or that there could not be, respectively, a multiplier. Closely linked with this is a renunciation by all concerned of a right to appeal the lodestar. Perhaps these provisions were tailored primarily to the presumed needs of counsel other than Moore. But Moore has not indicated that he objected specifically to this loss of appeal rights. Through his conduct Moore bound himself to this part of the agreement.

Finally, Moore argues that because the district court's fee award is not actually based on the settlement agreement, he retains his right to appeal the award. This case, however, began when the attorneys petitioned for fees and expenses in accordance with the terms of the Settlement Agreement. Even though these terms do not include a specific amount for attorneys' fees, they do provide for the court's determination of attorneys' fees. Thus, without

the Settlement Agreement, Moore and the other attorneys would have had no basis for obtaining their fees.

We will not allow Moore to have it both ways. He cannot accept the benefits of the Settlement Agreement and avoid the burden of agreeing not to appeal. Moore has waived his right to appellate review as stated in the Agreement. We thus affirm the district court's determination of Moore's lodestar figure.

IV.

For all the reasons stated, the district court's attorney fee awards are

AFFIRMED IN PART,
REVERSED IN PART
AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 1243

Judge John A. Nordberg

ARLIE G. SKELTON, JR., *et al.*, PLAINTIFFS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT.

No. 80 C 2151 and Consolidated Cases

Judge John A. Nordberg

JOSEPHINE NEWTON, *et al.*, PLAINTIFFS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT.

[February 11, 1987]

MEMORANDUM OPINION AND ORDER

In these consolidated class actions, the plaintiffs sued General Motors Corporation ("GM") for damages stemming from GM's installation of THM 200 transmissions into automobiles which allegedly required a THM 350 transmission. The parties entered into a comprehensive settlement agreement, which this court has approved in a

separate order entered on this date.[1] The settlement order did not determine the appropriate award of attorneys' fees for class counsel. The court has received fee petitions from nine law firms requesting attorneys' fees in connection with this action.[2] The class counsel seeks an aggregate "lodestar" amount of $3.3 million, and a 1.75 multiplier. The total fees and expenses requested amount to approximately $5.9 million.

After consideration of all the facts and circumstances, including reviewing the very extensive briefs and petitions and conducting a hearing on November 10, 1986, the court finds that the amounts set forth below provide the appropriate compensation for class counsels' efforts in this litigation.

The court has reduced both the hours and attorney fee rates sought by all attorneys for the reasons set forth in this opinion. However, in this court's opinion, the court has allowed reasonable hours and reasonable attorney fee rates so that all counsel shall be properly compensated for their legal efforts in the consolidated cases. The court's determination of the reasonable hours and rates for each fee petitioner is set forth at the end of this opinion.

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[1] The settlement dismisses the following actions: *Skelton v. General Motors Corp.*, No. 79 C 1243 (*"Skelton"*); *Newton v. General Motors Corp.*, No. 80 C 2151 (*"Newton"*); *Fritz v. General Motors Corp.*, No. 85 C 4805 (*"Fritz"*); *Morgan v. General Motors Corp.*, No. 81 Civ. 0280 (S.D.N.Y.) (*"Morgan"*); and *Attard v. General Motors Corp.*, No. 21558/79 (Supreme Court of the State of New York) (*"Attard"*).

[2] The fee petitioners are Charles A. Boyle & Associates, Ltd.; Corinblit & Seltzer; Abraham N. Goldman & Associates, Ltd.; Goodkind, Weschler, Labaton & Rudoff; Francis E. Goodman, P.C.; William J. Harte, Ltd.; Law Offices of Beverly C. Moore, Jr.; Sachnoff, Weaver & Rubenstein, Ltd.; and Zwerling, Schacter and Zwerling.

Procedural History

This litigation originated in the *In re General Motors Engine Interchange Litigation*, MDL No. 308 (N.D. Ill.), *rev'd*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146 (1979), *aff'd after remand*, 620 F.2d 1190 (7th Cir. 1980) (the "*Engines*" case). In *Engines*, the plaintiffs alleged that GM violated the written warranty provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312, by substituting different engines and other automotive parts, including transmissions, into certain lines of GM automobiles. Specifically, the *Engines* plaintiffs complained that GM had installed Chevrolet engines in 1977 Oldsmobiles, and THM 200 transmissions in automobiles which were supposed to be equipped with a THM 350 transmission. *See Engines*, 594 F.2d at 1114, 1132, n.44. On remand, Judge McGarr, who presided over the *Engines* litigation, separated the transmissions claims, and ruled that the case would proceed only on the engine interchange issues.

In response to Judge McGarr's decision, plaintiffs filed the *Skelton* action on March 29, 1979. An amended complaint was filed two months later. Although the *Skelton* complaint was patterned after the written warranty claims in the *Engines* litigation, it also contained allegations of deceptive warranties and breach of implied warranties. The *Newton* claims were filed approximately one year after *Skelton*, and alleged a different theory of liability stemming from GM's substitution of the THM 200 transmission. These plaintiffs alleged that GM's conduct in replacing the THM 350 transmission with a THM 200 transmission violated the implied warranty provisions contained in UCC § 2-314(2)(c) because the substituted transmissions were not "fit for their ordinary purpose."

During approximately the same time frame, two other groups of plaintiffs instituted similar litigation in New York. The *Attard* action was filed in New York state

court in 1979, and the *Morgan* action was filed in the New York federal district court in 1981. These complaints alleged that GM's conduct constituted a breach of its implied and express warranties in violation of the UCC and the Magnuson-Moss Warranty Act.

In 1979, GM moved to dismiss the *Skelton* complaint, which was then pending before Judge John Powers Crowley. The case was transferred to Judge Moran, and the parties rebriefed the pending motion to dismiss. On October 1, 1980, Judge Moran issued an opinion which upheld plaintiffs' written warranty claim, and dismissed the implied warranty and defective warranty claims. *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1190-95 (N.D. Ill. 1980). GM filed an interlocutory appeal, which was accepted by the Seventh Circuit. While *Skelton* was on appeal to the Seventh Circuit, the *Skelton* plaintiffs amended their complaint to include the *Newton* merchantability claims, and GM filed a motion to dismiss all the remaining *Skelton* and *Newton* claims.

In September of 1981, the Seventh Circuit issued its opinion in *Skelton*, reversing Judge Moran's recognition of a written warranty claim based on GM's substitution of the THM 200 transmissions for THM 350 transmissions. *Skelton v. General Motors Corp.*, 660 F.2d 311 (7th Cir. 1981). The Seventh Circuit denied plaintiffs' request for a rehearing and rehearing en banc on December 11, 1981; and the Supreme Court subsequently denied plaintiffs' petition for certiorari. *Skelton v. General Motors Corp.*, 456 U.S. 974, 102 S.Ct. 2238 (1982).

The *Skelton* and *Newton* plaintiffs filed a consolidated complaint under Magnuson-Moss shortly after the Seventh Circuit issued its opinion. The cases were then transferred to Judge Getzendanner, who accepted supplemental briefs and heard oral argument on the motion to dismiss. The cases were transferred to this court a few months later. At the time of this transfer, the par-

ties were still involved in the process of investigating and briefing issues regarding their class certification motions. This process included hiring experts, taking some depositions and responding to numerous inquiries regarding the class action.[3] In addition, due to the continuous development of the law in this area, the parties were often required to supplement their certification briefs to address the most recent decisions regarding class certification in cases of this subject and magnitude.

During this same time period, significant developments were taking place in New York and Washington, D.C. In New York, the *Attard* court denied GM's motion to dismiss, and was affirmed by the New York appellate court. Counsel proceeded with class certification motions and discovery in both *Attard* and *Morgan*; and then agreed to informally stay these proceedings pending the outcome of the *Skelton/Newton* class certification motions before this court. In Washington, GM was involved in an administrative action conducted by the Federal Trade Commission ("FTC"). The parties engaged in extensive discovery during the course of the FTC investigation, and subsequently entered into a consent decree settling the administrative action in November of 1983. This settlement, which was opposed by the *Skelton/Newton* plaintiffs, provided for the establishment of a Mediation and Arbitration program to resolve consumer complaints stemming from the operation of GM automobiles.[4]

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[3] The Magnuson-Moss Warranty Act, which provided federal jurisdiction, contains a one-hundred plaintiff rule for class actions instituted pursuant to its provisions. 15 U.S.C. § 2310(d)(3)(C). This unique requirement necessitated considerable expenditures of time both before and after this court's order certifying the "failures" class.

[4] This Mediation and Arbitration Board, which operates in conjunction with the Better Business Bureau, has awarded over $30 million to aggrieved consumers since its inception in 1983.

In 1984, the *Skelton/Newton* plaintiffs suggested that the court proceed with an initial certification of a "failures" class. This court issued an interim order on December 20, 1984, which revealed the court's intent to certify a "failures" class under Count I of the complaint. The court declined to certify any other classes at that time. The court also held that state privity law was applicable to the Magnuson-Moss cause of action. *Skelton v. General Motors Corp.*, No. 79 C 1243, Slip op. at 3 (N.D. Ill. Dec. 20, 1984). In addition, it denied GM's motion to dismiss plaintiffs' label and latent defect claims (Counts III and IV of the consolidated complaint). *Id.*

The parties began discussing the possibility of settlement following the issuance of this interim order. These discussions extended throughout 1985, and included conferences both in and out of court. After extensive negotiations, the parties reached a general agreement in December of 1985. They expended considerable time negotiating and drafting the final provisions of this agreement, which were presented to the court on June 16, 1986. The Agreement encompasses the following class of plaintiffs:

> All original owners (other than solely for purposes of resale) of a General Motors 1976-1980 model year vehicle equipped with a THM 200 transmission purchased in the United States, its possessions and territories, or the District of Columbia, who incurred any transmission repair expense within the first 50,000 miles of use of that vehicle.

In this settlement, GM agreed to establish a $17 million fund which will provide reimbursement for transmission service and repair costs incurred by plaintiffs in the "failures" class.[5] The parties agreed that the fund

[5] The settlement agreement also provides for an additional $2.5 million to be deposited by GM in the event that the plaintiffs' claims deplete the $17 million already deposited.

would be the only source of any attorneys' fees sought by plaintiffs' counsel, and that plaintiffs' counsel would not seek a fee award calculated on a percentage-of-recovery basis. In accordance with this agreement, plaintiffs' counsel have submitted timesheets and expense reports which reflect the hours of work devoted to this litigation.

Motion For Attorneys' Fees

Initially, the court must determine the source of its authority to award attorneys' fees in this action. The class counsel argues that fees should be awarded under the "common fund" doctrine, which permits an award of attorneys' fees where a litigant or his attorney recovers a common fund for the benefit of persons other than himself or his client. *See generally Boeing v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616 (1970). In contrast, GM argues that these fee petitions should be scrutinized under the attorneys' fee provision set forth in the Magnuson-Moss Warranty Act [6] and the Supreme Court and Seventh Circuit caselaw pertaining to statutory fee awards. *See generally Pennsylvania v. Delaware Valley Citizens' Council*, 106 S.Ct. 3088 (1986); *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 776 F.2d 646 (7th Cir. 1985).

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[6] This section provides:

> If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

15 U.S.C. 2310(d)(2).

In the court's view, the plaintiffs have exaggerated the difference between calculating fees pursuant to the common fund doctrine as opposed to a statutory fee provision. An award of fees under the common fund doctrine is an equitable practice which "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478, 100 S.Ct. at 749. The doctrine enables the court to offset this inequity "by assessing fees against the entire fund, thus spreading fees proportionately among those benefitted from the suit." *Id.* In addition to this unjust enrichment rationale, the common fund doctrine also contains an "incentive" rationale: by permitting an award of fees in these cases, the doctrine operates to encourage attorneys to engage in litigation which benefits certain groups of people who could not otherwise obtain representation for their interests. *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255, 262 (N.D. Ill. 1979); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1356 (N.D. Ill. 1974); *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 614 (D. Colo. 1974). *See* Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 476 (1981).[7] Although statutory fee awards are not based on an unjust enrichment principle, they contain the same "incentive" rationale as the common fund doctrine. *Pennsylvania v. Delaware Valley Citizens Council*, 106 S.Ct. at 2098 (1986) ("the aim of [fee-shifting] statutes [is] to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws."). *See* Leubsdorf, *supra*, at 477.

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[7] *See generally* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv.L.Rev. 849 (1975); Dawson, *Attorneys and Involuntary Clients: Attorney Fees From Funds*, 87 Harv.L.Rev. 1597 (1974).

Given this commonality of purpose, this court finds that the standards for determining reasonable attorneys' fees in common fund cases and statutory fee cases should not be significantly different.[8] In the court's view, the use of statutory fee guidelines to determine a proper fee award is especially relevant where the litigation is commenced and prosecuted under a federal statute which specifically provides for an award of attorneys' fees. When parties settle a case involving statutory fees, the amount ultimately awarded should not be dependent upon whether the fees are assessed directly against the defendant, or against a fund created by the defendant. *See* Leubsdorf, *supra*, at 489. Thus, although there may be theoretical distinctions between the common fund doctrine and statutory fees, these distinctions are not so great that they justify the use of completely different standards when calculating an award of attorneys' fees in a particular case.[9]

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[8] *See* Federal Judicial Center, Attorneys' Fees in Class Actions 4-11 (1980) (discussing the considerations for awarding attorneys' fees without mentioning a distinction between fund cases and statutory fee cases).

[9] If anything, the distinction between common fund fee awards and statutory fee awards may justify heightened judicial scrutiny because the fee will be paid out of a fund in which the defendant has only a contingent interest, and the plaintiffs' attorneys' interests conflict with the interests of the fund's beneficiaries. A recent discussion of the distinctions between common fund and statutory fee awards has suggested that the nature of a common fund award may actually necessitate greater judicial scrutiny of the fee petitions. Third Circuit Task Force, *Court Awarded Attorney Fees*, 15 (October 8, 1985). *See also City of Detroit v. Grinnell*, 495 F.2d 448, 469 (2d Cir. 1974), where the court noted:

> Courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough* [105 U.S. 527, 536 (1881)] when it advised that fee awards under the equitable fund doctrine were proper 'if made with moderation and a jealous regard to the rights of those interested in the fund.'

The Third Circuit Task Force recommends a specific procedure in common fund and statutory fee cases; however, this procedure—

Furthermore, regardless of any theoretical distinctions between common fund and statutory fee cases, the courts in this circuit employ the same general standards to calculate attorneys' fees in both types of cases. In *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, 96 S.Ct. 2214 (1976), a Title VII case, the court adopted the guidelines for attorneys' fees set forth in Rule 2-106 of the Code of Professional Responsibility:

1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3) Fees customarily charged in the locality for similar legal services;

4) The amount involved and the results obtained;

5) Time limit imposed by the client or the circumstances;

6) The nature and length of the professional relationship with the client;

7) The experience, reputation and ability of the lawyer or lawyers performing the services; and

8) Whether the fee is fixed or contingent.[10]

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which involves a percentage fee arrangement—is impossible in this case because the plaintiffs have agreed not to seek fees based on such a calculation.

[10] These factors were routinely used in common fund cases long before the advent of statutory fee provisions. *See In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255-56 (N.D. Ill. 1979) (tracing articulation of these standards to *In re Osofsky*, 50 F.2d 925, 927 (S.D. N.Y. 1931)). More recently, the Seventh Circuit has indicated that use of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.

The courts in this circuit have reiterated these factors in both common fund and statutory fee cases. *See, e.g., Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1249 (7th Cir. 1982) (antitrust); *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 585 (7th Cir. 1981) (patent); *Mills v. Eltra*, 663 F.2d 760, 762 (7th Cir. 1981) (common fund); *Muscare v. Quinn*, 614 F.2d 577, 579 (7th Cir. 1980) (42 U.S.C. § 1988); *Gross v. Schweiker*, 503 F.Supp. 260, 262 (N.D. Ind. 1983) (EAJA-28 U.S.C. § 2412); *Kennedy v. Nicastro*, 546 F.Supp. 267, 270 (N.D. Ill. 1982) (shareholders' derivative action); *Zilker v. Klein*, 540 F.Supp. 1196, 1199 n.8 (N.D. Ill. 1982) (shareholders' derivative action); *United States v. Vague*, 521 F.Supp. 147, 152 (N.D. Ill. 1981) (criminal); *Will v. United States*, 90 F.R.D. 336, 338 (N.D. Ill. 1981) (common fund); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255-56 (N.D. Ill. 1979) (common fund); *Arenson v. Board of Trade*, 372 F.Supp. 1349, 1351 (N.D. Ill. 1974) (common fund). *See also In re Warner Communications Securities Litigation*, 618 F. Supp. 735, 746-47 (S.D.N.Y. 1985); *Phemister v. Harcourt-Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at 66,995 (N.D. Ill. 1984); *In re Cenco Inc. Securities Litigation*, 519 F.Supp. 322, 325-26 (N.D. Ill. 1981); *In re Clark Oil Antitrust Litigation*, 422 F.Supp. 503, 511 (E.D. Wis. 1977); *Liebman v. Peterson Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974) (discussing similar factors in determining fee awards from common fund). Not all factors apply in a given case,[11] and no one factor is controlling.[12]

1974), is appropriate. *Lynch v. City of Milwaukee*, 747 F.2d 423, 427 (7th Cir. 1984). These factors are similar to the factors cited in the Code of Professional Responsibility. *Johnson*, 448 F.2d at 719; *Lynch*, 747 F.2d at 427.

[11] In the court's opinion, the second, fifth and sixth factors have little, if any, relevance to the request for fees in this case.

[12] In addition, since several of these factors may overlap, the determination of one factor may also resolve issues pertaining to

As the first factor indicates, the starting point in the court's analysis involves a determination of the number of hours reasonably expended on the litigation. This figure is then multiplied by the fees customarily charged in the locality for the services rendered to produce the "lodestar" figure. *Waters*, 502 F.2d at 1322. *See also Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983); *In re Cenco Inc. Securities Litigation*, 519 F.Supp. 322, 325-26 (N.D. Ill. 1981). After calculating the lodestar, the court may add an upward adjustment, or multiplier, to ensure that the fee award provides appropriate compensation to the plaintiffs' counsel for the work performed and the results achieved. GM has filed specific objections to the nine sets of timesheets submitted by plaintiffs' counsel. The court will discuss these objections in its review of the individual petitions, *infra*. Before launching into a discussion of the individual petitions, however, the court will address several recurring objections to the majority of the petitions.

1. *Time Spent on Alleged "Lost" and "Abandoned" Claims*

GM argues that the hours claimed by plaintiffs' attorneys should be reduced to account for the unsuccessful appeal to the Seventh Circuit in *Skelton* and the claims allegedly abandoned in the course of the settlement negotiations. In *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940 (1983), the Supreme Court held:

> work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' *Davis v. County of Los Angeles*, 8 E.P.D. [¶ 9444], 5049 [C.D. Cal. 1974]. The congressional intent to limit awards to prevailing parties requires

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another factor. For instance, the calculation of an hourly rate usually reflects the fees charged in a locality (factor three), and the experience, reputation and ability of the attorneys performing the services (factor seven).

> that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

Following this language in *Hensley*, GM asserts that plaintiffs' attorneys Boyle, Harte, Goodman and Goldman are not entitled to any fees or expenditures in connection with the *Skelton* claims dismissed by the Seventh Circuit in *Skelton v. General Motors Corp.*, 660 F.2d 311 (7th Cir. 1982), *cert. denied*, 456 U.S. 974, 102 S.Ct. 2238 (1983), and urges this court to disallow any fees for the time spent briefing the motions to dismiss before Judge Moran, the appeal to the Seventh Circuit, and the subsequent petition for certiorari.

Plaintiffs' counsel assert that the *Hensley* standards are inapplicable to fee awards under the common fund doctrine, which permits reimbursement for all fees expended in the creation of a common fund. This position exaggerates the distinctions between statutory and common fund fee awards. As stated earlier, the courts in this circuit apply the same criteria when determining awards for statutory fees and fees from a common fund. The common fund doctrine, like the statutory fee provisions, also instructs the court to analyze the fee petition to determine whether the plaintiffs "prevailed" on certain claims, and whether the time expended contributed to the ultimate favorable resolution of the case. *See e.g., Swanson v. American Consumer Industries*, 517 F.2d 555, 563 (7th Cir. 1975) (the fact that a plaintiff did not prevail on certain issues is entitled to weight in the determination of an appropriate fee award). *Kennedy v. Nicastro*, 546 F.Supp. 267 (N.D. Ill. 1982); *Zilker v. Klein*, 540 F.Supp. 1196, 1198-99 (N.D. Ill. 1982); *In re Penn Central Securities Litigation*, 416 F.Supp. 907, 917 (E.D. Pa. 1976), *rev'd on other grounds*, 560 F.2d 1138 (3d Cir. 1977). Accordingly, the court finds that the *Hensley* guidelines for assessing fees in statutory fee cases are

equally relevant to a determination of fees under the common fund doctrine.[13]

Regardless of the analysis employed, however, the court finds that exclusion of all the time expended on the *Skelton* claims would be improper. The Seventh Circuit recently discussed *Hensley*'s limitation of fees to those reasonably expended on "prevailing" claims in *Zabkowicz v. West Bend Co.*, 789 F.2d 540 (7th Cir. 1986). In *Zabkowicz*, the plaintiff filed a sexual harassment suit under Title VII which also contained pendent tort claims stemming from the alleged discriminatory conduct. The district court found that the defendants had violated Title VII, but it denied plaintiffs' request for attorneys' fees in its entirety because the hours were excessive and failed to distinguish between the time spent on the Title VII claim and the time spent on the state law claims. On appeal, the Seventh Circuit reversed, holding that the district court should consider the lawsuit as a whole, and take into account the interrelated nature of the various claims in the case when determining an appropriate fee award for a prevailing plaintiff. *Zabkowicz*, 789 F.2d at 551. The court instructed:

> Where several claims arise out of a common factual core or are based on related legal theories, separating 'out the legal services rendered with respect to these overlapping claims would be an exercise in futility.' In accordance with *Hensley*, we believe that prevailing plaintiffs may be entitled to compensation for time expended on such related claims.

Id. (citation omitted).

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[13] The guidelines for assessing statutory fees originated in the standards commonly used to assess the reasonableness of a petition seeking fees from a common fund. *See supra* note 9. *See also In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 583 n.19 (3d Cir. 1984); *Prandini v. National Tea*, 557 F.2d 1015 (3d Cir. 1977); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470-71 (2d Cir. 1974); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245, 255-56 (N.D. Ill. 1979).

The *Zabkowicz* court explained that the next inquiry involves whether the plaintiff's unsuccessful claims are sufficiently related to the successful claims to justify an award of attorneys' fees. It held:

> *Hensley* provides no precise method for determining whether claims are related or unrelated. Nonetheless, a 'useful tool for making this determination is to focus on whether the claims seek relief for essentially the same course of conduct.' . . . From this perspective, 'an unsuccessful claim will be unrelated to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised.'

Id. (citations omitted). In order to determine whether the claims were sufficiently related, the court examined each claim separately. It found that, "although these claims are based on distinct legal theories, they undeniably involve a common core of facts. The tort claims sought to remedy the same course of conduct that gave rise to the Title VII claims." *Id.* Accordingly, the Seventh Circuit remanded the question of attorneys' fees to the district court, finding that the plaintiff may be entitled to the entire amount of her fee claim, depending upon the "significance of the overall relief obtained . . . in relation to the hours reasonably expended on the litigation.' " *Id.* (citing *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940).

Following *Zabkowicz*, the court finds that wholesale exclusion of the time expended on the Seventh Circuit appeal and petition for certiorari is not warranted in this case. *See Lenard v. Argento*, No. 85-1786, slip op. at 4 (7th Cir. January 6, 1987) (rejecting defendant's "mechanical claim-chopping approach" to attorneys' fees). These claims alleged the same improper conduct and

sought the same remedy ultimately provided in the settlement agreement. In *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 576 (7th Cir. 1983), the court held:

> If, . . . the plaintiff has asserted unsuccessful claims related to the successful claims by a 'common core of facts' or that are based on 'related legal theories,' . . . time spent on these related but unsuccessful claims should not automatically be excluded in arriving at a reasonable attorney's fees award. Instead, the court [should] focus on the overall results obtained to determine whether it should compensate the plaintiff for the hours spent on the related but unsuccessful claims. Generally, if the results obtained are excellent, the '[plaintiff's] attorney should recover a fully compensatory fee,' which will '[n]ormally . . . encompass all hours reasonably expended on the litigation. . . .' If the plaintiff has achieved only partial success, however, compensating the plaintiff for all hours expended on the litigation may be excessive. In such a situation, the court may adjust the award either by identifying specific hours that should be eliminated or by simply reducing the overall award to reflect the plaintiff's limited success.

citing *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940. Thus, although a reduction may be appropriate to reflect the reasonableness of this time in light of the relief ultimately obtained,[14] the court rejects GM's argument that all of this time must be excluded from consideration when determining the proper fee award. *See also Lenard v. Argento*, No. 85-1786, slip op. at 4 (7th Cir. January 6, 1987) (where a lawyer "presents a congeries of theories each factually and legally plausible, he is not penalized because some, or even all but one, are rejected, provided that the one or ones that succeed give him all that he

[14] The court has made some adjustments to reflect the relationship between these hours and the settlement agreement.

reasonably could have asked for."); *Ramos v. Lamm*, 713 F.2d 546, 556 (10th Cir. 1983) (reduction for lost claims may not be necessary if plaintiffs' claims involve a common core of facts or are based on related legal theories); *Monroe v. United Air Lines, Inc.*, 565 F.Supp. 274, 285-86 (N.D. Ill. 1983) (allowing fees for an unsuccessful preliminary injunction where the plaintiffs ultimately prevailed in the litigation).

GM also seeks a reduction in hours to reflect the fact that plaintiffs relinquished some claims during the course of the settlement agreement. The foregoing discussion applies with equal or greater force to these so-called 'abandoned" claims. Basically, to oversimplify, all of these claims involve different theories to redress the same wrong—GM's placement of THM 200 transmissions into automobiles requiring THM 350 transmissions. In *Zabkowicz*, the Seventh Circuit recognized that, when a plaintiff voluntarily dismisses a claim as part of a settlement vindicating his rights, a fee award based on all the plaintiffs' claims may be appropriate. *Zabkowicz*, 789 F.2d at 552. In the present case, the court never ruled on the remainder of the plaintiffs' petitions for class certification, and it denied GM's motions to dismiss. Plaintiffs' counsel should not be penalized just because they relinquished some claims in order to reach a comprehensive settlement agreement with GM. *See Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 567 (7th Cir. 1983). Accordingly, the court rejects GM's assertion that the fee award should be decreased to reflect the plaintiffs' dismissal of related claims in the course of the settlement negotiations.

As a corollary to the arguments regarding the "lost" and "abandoned" claims, GM argues that the fee award should be reduced significantly to reflect the disparity between the relief sought and the recovery obtained in the settlement agreement. Although the plaintiffs did not obtain relief on behalf of all the classes originally desig-

nated in the complaints, this does not diminish the very significant recovery obtained by class counsel in their pursuit of this litigation. As with any claim involving an area of uncharted law, plaintiffs were required to develop alternate theories for GM's liability. This involved formulating innovative arguments to convince the court of the viability of pursuing these claims as a class action, and presenting the court with sufficient authority to defeat GM's vigorous and able efforts to dismiss the litigation. Counsel's very substantial efforts in this regard have not gone unrewarded. Through their efforts, millions of consumers across the country will be able to obtain reimbursement for costs incurred in attempts to repair their THM 200 transmissions.

GM seeks to diminish the nature of plaintiffs' undertaking and the level of their success. The record in this case and the size of the settlement fund illustrate the substantial benefits that plaintiffs' counsel have conferred on the class. They achieved class certification in a nationwide Magnuson-Moss warranty action, and successfully defeated GM's repeated efforts to decertify the class and dismiss the case. Although they cannot claim direct credit for the settlement of the FTC action, it is a fair inference that the pendency of these cases had some effect on the willingness of GM to enter the consent decree with the FTC. This agreement provided relief to putative members of the class through the creation of a Mediation and Arbitration panel.

Finally, the terms of the June 16, 1986 settlement agreement between GM and the plaintiffs clearly demonstrate the significant benefits that the class counsel achieved for many members of the class. In *Illinois Welfare Rights Organization v. Miller*, 723 F.2d 564, 567 (7th Cir. 1983), the court recognized that

> Although some settlement agreements may be structured so that they dispose of the original claims in a way that allows the court to decide whether a

> particular claim has been ultimately successful or unsuccessful, this will not always be the case. Indeed, many settlements will be informally structured with an eye toward the achievement of overall objectives, rather than the disposition of discrete claims. With these more general settlements, the analysis in *Hensley* regarding successful and unsuccessful claims may be unworkable, although the central teaching of *Hensley* will still apply. That teaching is that in every case the court must explicitly consider whether the fee is a reasonable one in light of the level of the plaintiff's success.

This case clearly presents a situation where the settlement was "structured with an eye toward the achievement of overall objectives." Following the Seventh Circuit's instruction in *Illinois Welfare Rights*, this court will focus on the reasonableness of the fees, and will not reduce the award merely because the recovery obtained is less than that requested at the outset of the litigation.

2. *Time Spent on Class Certification Motions*

GM objects to the time expended on the motions for class certification, which, by GM's calculation, surpasses 3200 billable hours. According to GM, this figure is comprised of excessive "read and review time" and "conference" time between the various sets of plaintiffs' counsel. Although this 3200 figure appears excessive when considered in the abstract, the court finds that the procedural history of this case and the complex nature of this suit justifies the great majority of the hours claimed on the class certification motions (the court has made some reduction in hours for excessive review and conference time and other time of little benefit to the result achieved). By operation of the local rules of court, five district court judges presided over this litigation be-

tween 1978 and 1982.[15] The necessary process of familiarization which accompanied each transfer to a new judge required some duplication of effort beyond the control of the class counsel. Each transfer necessitated some new briefing and updating of the class certification motions. The class counsel should not be penalized for the so-called "duplicative" hours spent familiarizing transfer judges with the background of a case and its pending motions. The complicated nature of this lawsuit, the extraordinary size of the class, and the uncertainty and continuing evolution of the law in this area also demanded a significant expenditure of time. Most of the time spent briefing and updating these motions was necessary and well-invested, and ultimately persuaded the court to certify at least one class of plaintiffs and to deny GM's motion to dismiss. Accordingly, the court finds that an overall general reduction in fees for excessive briefing is not warranted in this case.[16]

3. *Staffing at Court Appearances*

GM also accuses plaintiffs' counsel of overstaffing at court appearances by providing several lawyers at some hearings where one or two lawyers would suffice. GM refers to several hearings to illustrate this objection. In general, the courts are reluctant to allow compensation for an abundance of attorneys appearing on a routine matter. *See, e.g., In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 579 (3d Cir. 1984); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296, 1307

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[15] The docket reflects the following chronology: Judge McGarr (1977-1979) (part of *Engines*); Judge Crowley (1979-1980); Judge Moran (1980-1982); Judge Getzendanner (May 1982-September 1982); Judge Nordberg (September 1982 to present).

[16] The court has discussed individual instances of excessive billing in its section addressing the individual petitions. Even if some excesses did occur, they were not so rampant as to justify GM's request for an across-the-board reduction in fees.

(E.D. N.Y. 1985); *In re Continental Illinois Securities Litigation*, 572 F. Supp. 931, 933 (N.D. Ill. 1983); *United States v. Allen*, 578 F. Supp. 468, 483 (W.D. Wis. 1983). Where an attorney appears at a hearing as a "spectator" rather than a participant, he should not be compensated for his time in court because his presence does not materially advance the progress of the litigation. *See In re Fine Paper*, 751 F.2d at 579. If the circumstances of the hearing require the presence of more than one attorney, however, then the court should allow attorneys' fees to all necessary participants in the hearing.

Although this court has presided over these cases only since May, 1982, it disagrees with GM's characterization of plaintiffs' alleged "overstaffing" at court appearances. These cases were not consolidated until late 1981. Prior to the consolidation, the counsel for *Skelton* and *Newton* had to appear separately because they had separate clients and were advancing different theories of recovery. Each transfer of the case necessitates an appearance by group counsel before the new transferee judge to familiarize the judge with the attorneys and the issues in the case. The number of attorneys which have appeared before this court between 1982 and 1986 has never seemed excessive to this court. For the most part, the attorneys who have appeared in the last four years actively participated in the hearings and contributed to the advancement of the litigation. (The defendant has routinely been represented by two lawyers at court appearances.) This court has not observed excessive attendance by counsel which would justify a decrease in the hours allowed. Accordingly, the court finds that the requested reduction for overstaffed court appearances is not warranted in this case.

4. *Travel Time*

GM also objects to class counsel billing full rates for time spent travelling to other cities in pursuit of this litigation. With the exception of the Zwerling and Good-

kind petitions, the fee petitions do not clearly delineate the hours that they seek to charge the fund for time spent on a plane or some other means of transportation. When questioned about the amount of in-flight time charged, plaintiffs' counsel admitted that they charged for time spent in transit, but only if that time was actually spent working on the case. However, they did indicate that they were usually working on the case while in transit. It is this court's experience that cramped working conditions, limited access to materials, frequent interruptions, and inevitable distractions render travel time much less productive than other time spent on a case. Accordingly, the court has reduced the hours claimed for travel to and from a given destination by 50%. *See Orshan v. Macchiarola*, 629 F. Supp. 1014, 1020 n.3 (E.D. N.Y. 1986); *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296, 1349 (E.D. N.Y. 1985); *Society for Goodwill to Retarded Children v. Cuomo*, 594 F. Supp. 994, 998 (E.D. N.Y. 1983).[17]

5. *Attorney Fee Rate*

When attorneys undertake to represent a class, their fees are usually contingent on the success of the class action, and they may not be paid for their efforts until several years after the action is commenced. This results

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[17] Some courts in this circuit have indicated that full compensation for travel may be appropriate. *See Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984); *Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 454-55 (N.D. Ind. 1981), *aff'd in relevant part*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983). The court acknowledges that a complete reduction in travel time is too harsh; however, it finds that travel time should be reduced to reflect the fact that, because of travel demands and inevitable distractions, these hours are not as beneficial or productive as time spent at the office or in court. *Society for Goodwill to Retarded Children v. Cuomo*, 574 F. Supp. 994, 998 (E.D. N.Y. 1983); *Ryan v. Raytheon Data Systems Co.*, 601 F. Supp. 243, 256 (D. Mass. 1985). These reductions are set out in more detail in the discussion of the individual petitions.

in the loss of both the use and some of the value of money, thus prompting counsel to seek an adjustment for interest and inflation. In order to account for the effects of this delay in payment, the courts in this circuit generally allow an attorney to submit his entire fee request calculated in accordance with his current rate, which provides a rough approximation for the effects of delay. *See, e.g., Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 764 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983); *Gautreaux v. Pierce*, 690 F.2d 601, 612 (7th Cir. 1982), *cert. denied*, 461 U.S. 961, 103 S.Ct. 2438 (1983); *Coleman v. Fierson*, 607 F. Supp. 1578, 1581 (N.D. Ill. 1985); *Phemister v. Harcourt Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at ¶ 66,996 (N.D. Ill. 1984).[18] *See also Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983); *In re "Agent*

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[18] In *Ohio-Scaly Mattress Manufacturing Co. v. Scaly, Inc.*, 776 F.2d 646, 663 (7th Cir. 1985), the Seventh Circuit acknowledged that a district court could compensate for the delay in payment by using current rates, but it was not required to do so. *See also Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 764 n.16 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2328 (1983). The *Ohio-Scaly* litigation spanned over fifteen years, and the trial court declined to employ current rates because it determined that current rates would produce a windfall to the plaintiff's attorneys. The Seventh Circuit affirmed the refusal to use current rates, noting that "[w]hen a case lingers on for a long time, . . . using current hourly rates may produce a windfall for the plaintiff since changes in hourly rates reflect not only inflation but also an attorney's increased experience and skill." *Id.* at 663. GM relies on this language to argue that the use of current rates will result in a windfall to class counsel in the present case. This court disagrees. This litigation spanned a period of seven years, which witnessed periods of very high inflation. Calculating all fees at or near current rates adequately offsets the loss generated by the delay in payment in this case. *See Chrapliwy v. Uniroyal, Inc.*, 509 F. Supp. 442, 457-58 (N.D. Ind. 1981), *aff'd in relevant part*, 670 F.2d 764 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983) (affirming calculation of fees at current rates for litigation spanning eight year period).

Orange" Product Liability Litigation, 611 F. Supp. 1296, 1310 (E.D. N.Y. 1985).

In the present case, seven of the nine petitioners have requested fees at their current rates. The Sachnoff, Weaver firm and the firm of Charles A. Boyle seek fees at their historic rates, plus interest calculated at the prime rate for a given time period. Calculation of fees pursuant to this method produces significantly higher fees than those obtained by using the firms' current rates.[19] Following the procedure generally accepted in this Circuit, the court finds that in this case the calculation of reasonable fees on a current basis properly compensates all petitioning attorneys for the delay in payment in this case.

In calculating on a current basis the reasonable fee rate to be allowed each attorney in this case, the court took into account all relevant factors, including the benefit to the class, the skill and the difficulty of the legal work completed, time reasonably required and duplication of efforts, current fee rates charged by the lawyer for similar services, current fee rates customarily charged

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[19] Calculating fees at historical rates plus a prime rate enhancement, Boyle's petition totals $742,667.86. If calculated at current rates, his total requested fees are less than half that figure. Similarly, calculating Sachnoff's hours at a historical rate with a prime rate enhancer produces fees much greater than the figure obtained by calculating fees in accordance with the firm's current rates.

In a supplemental submission, Boyle encourages this court to follow the decision of Judge Roszkowski in *Airline Stewards and Stewardesses Assn., et al. v. Trans World Airlines, Inc., et al.*, 70 C 2071 (74 C 2063) (N.D. Ill. September 17, 1986). The court's review of this case reveals that this decision does not support the prime rate interest enhancer requested by Boyle and Sachnoff. In *Airline Stewards*, Judge Roszkowski actually rejected an interest rate enhancement determined according to the prime rate. He found that the attorneys were entitled to an interest enhancement of 7½ percent, the interest rate on a long-term treasury rate purchased at the start of the litigation. *Id.* at 4.

in the locality for similar legal services, the amount involved and results obtained, the experience, reputation, and legal ability of each lawyer, the difficulties in dealing with such a large class of claimants, and the contingency of the fee. The court is mindful of the chilling effect on future consumer class actions that might result from failure to adequately compensate counsel for their efforts in this litigation.

The Individual Petitioners

Charles A. Boyle & Associates Ltd.

Boyle requests compensation for 1764.80 hours at $200/hr. GM has four basic objections to Boyle's petition for fees. First, it argues that the time spent on the losing *Skelton* appeal should be eliminated in its entirety. As this court explained above, however, plaintiffs may still seek compensation for the time spent on the *Skelton* claims because they are related to the claims on which plaintiffs ultimately prevailed. However, the court finds that, since the pursuit of these claims did not fully contribute to the creation of the settlement fund, these hours should be reduced by 33%. The court's review of Boyle's petition reveals that he expended approximately 475 hours pursuing the *Skelton* claims in the district court, the appeal and the petition for certiorari. The court will permit compensation for 67% of those hours, or 318.25.[20]

Second, GM accuses Boyle of excessive "read and review" time. Although every class action staffed by several groups of plaintiffs' lawyers generates some necessary "read and review" time, it is this court's role to ensure that the attorneys do not engage in excessive

[20] The court has disallowed the costs of printing the briefs on appeal.

reviews of each others' work. *See In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984); *Lackey v. Bowling*, 476 F. Supp. 1111, 1118 (N.D. Ill. 1979); *Manual for Complex Litigation*, § 24.22 at 189. The court has reviewed all of Boyle's entries, and finds that, given his role in this litigation, his review time is, for the most part, sufficiently well-documented and within reason.

GM's third objection is closely related to the second one. GM accuses Boyle of engaging in too much "conference" time with the other plaintiffs' attorneys. Boyle's fee petition contains references to a number of conferences, phone calls and meetings with the other members of class counsel. The court finds that Boyle's conference time, like his "review" time, is not greatly excessive in light of the history and demands posed by this litigation (*i.e.*, consolidation of two separate actions, transfer to several judges, and the protracted settlement negotiations). However, the court finds that the timesheets do reflect some duplication of effort and extensive reviewing and conferring with limited benefit to the class. Therefore, the court has reduced the requested hours by 10% to reflect this.

Finally, GM asserts that Boyle charged premium rates for tasks which could be performed by paralegals. For the most part, these tasks included review of the case file and communication with class members. Generally, a senior attorney is not entitled to premium rates for services which could be performed by a paralegal or less experienced attorney. *See Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 767 n. 16 (7th Cir. 1982), *cert. denied*, 461 U.S. 956, 103 S.Ct. 2428 (1983); *Daggett v. Kimmelman*, 617 F.Supp. 1269, 1282 (D. N.J. 1985). After reviewing Boyle's petition, the court finds that some of the hours claimed for senior attorney time should have been delegated to paralegals. The court has reduced Boyle's time accordingly. *See Daggett*, 617 F.Supp. at 1282 ("It was the fee applicant's prerogative to staff every task involved

in this case with partners, but that does not automatically entitle the law firm to recover 'partner rates' for everything").

The court notes that Boyle also seeks to charge fees for the time spent talking to the press.[21] In the court's view, this time should be compensated at 33% of the hourly rate because it involves minimum benefit to the class and does not involve a task which justifies full compensation for senior attorney time. *Cf. Society for Goodwill to Retarded Children v. Cuomo*, 574 F.Supp. 994, 998-99 (E.D.N.Y. 1983) (disallowing all time spent with media).

GM also objects to Boyle's list of expenses, which GM characterizes as overhead charges subsumed in Boyle's hourly rate. *See Ramos v. Lamm*, 713 F.2d 546, 557, 559 (10th Cir. 1983); *Roe v. City of Chicago*, 586 F.Supp. 513, 516 (N.D. Ill. 1984). If a case involves unusual expenditures over and above the expenses necessary for the operation of a law firm, then these expenses are properly chargeable to the fund. *Ramos*, 713 F.2d at 559; *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1322 (E.D. N.Y. 1985). The criticized charges in Boyle's petition include automated answering machine services, storage space and office supplies. Given the magnitude of the litigation and the necessity of establishing adequate facilities and support systems to respond to class inquiries and store class information, these expenses cannot be characterized as mere overhead expenses which should be included in Boyle's hourly rate.[22]

Corinblit & Seltzer

The two principals of this firm seek compensation for a total of 100 hours that the firm expended on this litigation. Jack Corinblit logged 41 hours at a claimed rate of

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[21] By the court's calculation, this amounts to approximately 6 hours, 2 of which will be allowed.

[22] However, the court has disallowed a public relations expense of $693.75.

$250/hr., and Marc Seltzer logged 59 hours at a claimed rate of $225/hr. These attorneys never appeared before the court on the case. From the timesheets, it appears that their primary involvement in this case was their participation in a deposition in December of 1980.[23]

GM argues that the requested fees should be reduced because nearly all of their time was spent "conferring and reviewing" the work of other attorneys. After analyzing these timesheets, the court concludes that their conference and review time is excessive, and has been reduced accordingly. Corinblit's timesheets reveal that over 23 of his 41 requested hours were spent in conferences with other class counsel. Over 16.5 hours of this conference time included Marc Seltzer, his partner. Seltzer logged 34 hours of conference time, and 13.25 hours of these conferences included Corinblit. The firm has not provided the court with any justification for its double-staffing at these conferences. In *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1325 (D. N.J. 1985), the court disallowed all time spent in conferences between partners and associates of the same firm. Although a wholesale elimination of conference time between members of the Corinblit firm is not warranted under the facts of this case, the court finds that a reduction in these hours is appropriate. In order to offset what might otherwise constitute double-billing, the court has reduced Corinblit's request by 8.25 hours and Seltzer's request by 6.5 hours. In addition, because the court finds that there has been little benefit resulting from excessive reviewing and conferring with other counsel, the court has reduced the requested hours by 20%.

Abraham N. Goldman & Associates, Ltd.

GM objects to Goldman's request for compensation in connection with the losing *Skelton* appeal. In accordance with the procedure employed in the Boyle petition, this

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[23] The court has calculated Corinblit's fees at a rate of $200/hr. and Seltzer's fees at a rate of $175/hr.

court has determined Goldman is entitled to fees for 66% of the time expended on the *Skelton* appeal, and his time spent travelling to Washington, D.C. has been reduced 50%.[24]

GM also aserts that Goldman's hourly rates are excessive in light of his experience. Mr. Goldman started practicing shortly before these cases were commenced. The court has taken his experience into account when setting the appropriate hourly rate.[25]

Finally, GM objects to Goldman's request for premium compensation for so-called "clerical tasks." The statutory prerequisites of Magnuson-Moss class actions necessitated many communications with class members. Goldman's responsibilities in this litigation involved substantial communication and interaction with individual members of the plaintiff class. His staff included several paralegals who were given significant responsibilities in organizing and maintaining the records of the plaintiff class members. His ability to delegate is reflected in the fact that he claims approximately 2,000 attorney hours and over 5,500 paralegal/data entry hours. *See Phemister v. Harcourt-Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at 66,996 (N.D. Ill. 1984). However, the nature of Mr. Goldman's involvement in this case was primarily administrative. The court has reduced his time by 10% to reflect the fact that the tasks he undertook toward the end of the litigation were primarily administrative in nature, as well as to adjust for the extensive time spent on conferences, reading and reviewing, with limited benefit to the substantive legal issues in the case.

Goodkind, Weschler, Labaton & Rudoff

The Goodkind, Weschler firm filed the *Morgan* and *Attard* actions in New York, which were transferred to

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[24] The court has reduced his requested hours by four hours to reflect time spent traveling.

[25] The court has calculated Mr. Goldman's fees at a rate of $150/hr.

this court in conjunction with the settlement. These actions were informally stayed in 1983 pending this court's ruling on the class certification motions. Before this stay, these attorneys successfully defeated GM's motion to dismiss, and commenced discovery in these actions. The firm seeks a total of $378,207.07 in fees for over 1600 hours of work.[26] GM's major objection to this firm's fee petition is that it is too vague to permit any meaningful review.

The firm's timesheets are on a computer printout, and are admittedly brief. The firm has supplemented its petition in its reply brief, however, and the entries are not so cursory that they preclude this court from determining their accuracy. *See Berberena v. Coler*, 753 F.2d 629, 634 (7th Cir. 1985) (entries are sufficient if they identify the substance of the work performed). The firm delegated a great deal of the responsibility for the prosecution of the actions to lower-level associates and paralegals. However, there was an extensive amount of time spent on conferences, reading and review with some duplication. Therefore, the court has reduced the requested legal hours by 10% and paralegal time by 5%.

In accordance with the court's guidelines for travel time set forth above, the court has reduced the time claimed for work while travelling to and from Chicago by 50%.[27]

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[26] The court has calculated the firm's fees at the following hourly rates:

Attorney	Rate/Hr.
S. Weschler	$220
E. Labaton	$220
W. Kass	$200
R. Schacter	$160
L. Sucharow	$150
J. Plasse	$120
M. Isaacs	$ 70
E. Perry	$ 70

In determining these hourly rates, the court considered the fact that most of these hours were expended between 1980 and 1983.

[27] The court has disallowed ten hours of travel time.

Francis E. Goodman, P.C.

Goodman's fee petition seeks compensation for 451.70 hours of time at a rate of $150/hr. GM asserts that this petition should be substantially reduced or denied in its entirety because Goodman contributed very little in the case, and he spent most of his time reviewing the work of other attorneys. Goodman's petition is replete with entries seeking compensation for his review time. Although this court was not able to observe Mr. Goodman's role in the early stages of the litigation, he has not been a primary player since these cases were transferred to this court in 1982. Given his limited role since that time, the court finds that he is not entitled to compensation for all of his time spent in conferring and reviewing the work of the other attorneys more heavily involved in the litigation. The court disagrees with GM's argument that all this review time must be disallowed, however. The court has determined that a 25% reduction in the hours claimed is appropriate to reflect the limited benefit from Goodman's hours expended in this litigation. *See In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 579 (3d Cir. 1984); *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1325 (D. N.J. 1985); *United States v. Allen*, 578 F.Supp. 468, 483 (W.D. Wisc. 1983).

GM also requests a reduction in Goodman's hours to reflect time spent on the losing *Skelton* claims. Consistent with the procedure adopted for these claims in the Boyle and Goldman petitions, the court has determined that Goodman's time spent on these claims should be reduced by 33%.

William J. Harte, Ltd.

Harte requests attorneys' fees and costs totalling $438,456.94. GM argues that his request should be diminished to reflect the time spent on the losing *Skelton* appeal. The court finds that, for the reasons set forth on pages 10-13, *supra*, a complete elimination of this time is unwarranted.[28] Although the court will allow compensa-

[28] The court has reduced costs associated with the *Skelton* appeal and petition for certiorari.

tion for time spent on these claims, the attorney and paralegal time will be reduced 33% to reflect its contribution to the ultimate settlement of this action.

GM also accuses Harte of poor record-keeping and vague entries. Although several entries are somewhat cursory, this court is sufficiently familiar with Harte's important role in the litigation to permit these entries without a request for clarification. *Berberena v. Coler*, 753 F.2d 629, 634 (7th Cir. 1985). However, because of the extensive amount of time spent on conferences, reading, and review with limited benefit to substantive legal presentation, the court has reduced the requested hours of Mr. Harte by 10% and for similar reasons the paralegal time by 5%.

Law Offices of Beverly C. Moore, Jr.

Moore's petition requests compensation for nearly 4,000 hours of attorney time and over 1,400 hours of paralegal time. GM raises several objections to Moore's request for fees and expenses. First, GM disputes Moore's requested hourly rate of $175/hour, and argues that Moore has insufficient experience to justify such a high fee. Taking into account all the relevant factors previously referred to, the court finds that Moore is entitled to compensation at a rate of $140/hr. Although Moore provided research for the class certification briefs, and demonstrated some expertise in addressing problems posed by this class action, his rate should reflect, among other things, the fact that he does not have a great deal of litigation experience.

Second, GM challenges Moore's request for fees in connection with the *Fritz* action. Moore filed this action in the federal district court for the District of Columbia in 1984, shortly before this court issued its interim ruling. After the interim ruling, Moore secured an order transferring the case to this court. The court agrees with GM that the filing of this case did nothing to advance

the progress of this litigation or achieve the ultimate settlement of the case. In *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1296, 1307 (E.D. N.Y. 1985), the court noted:

> One instance of duplicative work arising from the nature of a class action, . . . concerns the filing of individual lawsuits by class members. Attorneys who file individual suits on the same claims involved in the class action do not substantially aid the prosecution of the class action. These collateral cases ultimately are dismissed as duplicative. An award of fees for such 'me too' litigation would encourage fruitless and unnecessary work.

Moore's filing of the *Fritz* action in Washington, D.C. is a perfect example of "me too" filing of duplicative litigation criticized in *Agent Orange*. It is significant that none of the other class counsel joined Moore in the filing of this action, nor do they seek any fees in connection with it. The court finds that Moore is not entitled to any fees or expenses in connection with the *Fritz* case because this action involved unnecessary expenditures of time and money which bear no relation to the favorable settlement in this case or the creation of the settlement fund.[29]

Moore did not join the other plaintiffs' counsel in the settlement agreement. In fact, he strongly resisted the settlement which created the common fund. GM argues that Moore should not be compensated for the time spent resisting the settlement, because these efforts hindered the settlement negotiations instead of helping them. The court agrees with GM that Moore is not entitled to full compensation for the time spent objecting to the settlement. The fund does not have to pay attorneys' fees for the time spent *objecting* to its creation. Although Moore's

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[29] By the court's calculation, Moore spent 155.8 hours of attorney time and 73.3 hours of paralegal time on the Fritz action.

time spent on the settlement is not fully compensable, the courts finds that he is entitled to some remuneration for his participation in the settlement processes. An objector to a settlement process often sharpens the issues and may achieve additional benefits for the class. Although he opposed the settlement, Moore's participation in the settlement negotiations cannot be dismissed in its entirety. Therefore, the court has determined that he is entitled to 50% of his time in the settlement stake of the case.

Moore took one trip to Reading, Pennsylvania and approximately seventeen trips to Chicago. Consistent with the guidelines set forth *supra* on page 18, the court has reduced his work travel time by 50%.[30] The court has also reduced Moore's time spent talking with the media to 33% *See Society for Goodwill to Retarded Children*, 574 F. Supp. 994, 998-99 (E.D. N.Y. 1983).[31] Because of the very extensive amount of time spent on conferences, reading and review, and especially preliminary matters long before litigation commenced, with the very limited benefit to the success of the case, the court has reduced the requested hours of Mr. Moore by 40% and paralegal time by 11%.

Moore requests expenses totalling $43,206.98. GM argues that some of these expenses are not compensable because they should be considered part of overhead. *See In re Fine Paper Antitrust Litigation*, *supra*. In par-

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[30] Moore seeeks compensation for 17 trips to Chicago.

[31] The court rejects Moore's request for compensation for the following entries unrelated to the present class action:

2/19/85	T/C w/Ben Todd re *Pope v. GM*	4.7
12/03/82	Prepare Findex of Briefs	11.0
10/25/79	T/C w/W.Va. attys in Ford Piston scuffing case	1.0
8/12/79	Watched Report on NBC program Prime Time Sunday	.3
		17.0

ticular, GM argues that the charges for overtime word processing should have been subsumed in Moore's hourly rate. The court disagrees. Given Moore's role in the briefwriting process, the resort to overtime staff to complete the pleadings in this case was sufficiently necessary and predictable. The court does not view these charges as unreasonable.[32]

Sachnoff, Weaver & Rubenstein, Ltd.[33]

GM's major objection to Sachnoff's entries revolves around the firm's request for computation of fees at historic rates with an upward adjustment to reflect interest calculated at the prime rate. The court's has decided that it is in the interests of justice to award all fees on a current basis, regardless of when the work was performed.[34]

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[32] However, most of Moore's miscellaneous expenses have been eliminated because they bear no apparent relationship to this action (ex: bank service charges, post cards, tape recorder, magazine).

[33] The Sachnoff firm is the only firm that requests reimbursement for its time spent preparing a fee petition. Some of this time was spent preparing the firm's own petition and some was expended preparing the joint briefs filed by the class counsel in this case. In general, the courts have agreed that this time is not compensable in common fund cases because it is clearly not time spent creating, preserving or enlarging the fund. *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 579 (3d Cir. 1984); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Lindy Brothers, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 111 (3d Cir. 1976); *Bailey v. Heckler*, 621 F. Supp. 521, 524 (W.D. Pa. 1985); *Hew Corp. v. Tandy Corp.*, 480 F. Supp. 758, 764 n.10 (D. Mass. 1979); *Population Services International v. Carey*, 476 F. Supp. 4, 7 n.3 (S.D. N.Y. 1979); *Spiekerman v. Whittaker Corp.*, 598 F. Supp. 1, 8 (E.D. N.Y. 1978). The court will follow this rule and disallow the time spent preparing the fee petition for the Sachnoff firm. However, the court will allow $15,000 for the time spent drafting the joint brief.

[34] The court has awarded the Sachnoff firm fees at the following rates:

GM also accuses the Sachnoff firm of overbilling and vague time keeping. The overbilling charge stems from GM's assertion that the hours spent on "abanonded claims" and the time spent briefing the class certification motions must be reduced to reflect the limited nature of the relief obtained. These objections have been addressed in earlier portions of the opinion. Suffice it to say that this firm has been at the forefront of this litigation and has played a major role in achieving the creation of the settlement fund. The Sachnoff firm has fulfilled a lead role and has submitted high quality work throughout this litigation. Because of the extensive amount of time spent on conferences (including intra-firm conferences), reading and review, with a limited benefit for same, the court has reduced the requested hours by 5% and paralegal time by 5%.[35]

Zwerling, Schacter & Zwerling

Zwerling, Schacter is a New York-based firm which was formed in January of 1985, after its partners left the Goodkind, Weschler firm. The firm has acted as co-counsel with Goodkind in the *Morgan* and *Attard* actions from January of 1985 to the present. It requests compensation for 90.30 hours of attorney and paralegal time. The court has reviewed the firm's timesheets, and

Attorney	Rate/Hr.
L. Sachnoff	$240
B. Rosen	$145
M. Tenenbaum	$125
M. Denlow	$110
C. Watkins	$135
J. Schumacher	$130
J. Feldman	$ 80
D. Morris	$ 70
M. Kaufman	$ 90

[35] The court has reduced the award by 17 hours (10 for BAR, 7 for JAS) for travel time and 5 hours spent speaking to Mr. Moore about the *Fritz* action.

has reduced travel time by 50% for the reasons previously indicated.[36] Because of the very extensive time spent on conferences and review, again the court has reduced the requested hours by 20%.

Request for a Multiplier

Having calculated the proper lodestar amount for plaintiffs' attorneys, the court now turns to plaintiffs' request for an upward adjustment of .75 to be added to the lodestar. The class counsel argues that this multiplier of 1.75 is necessary to compensate them for the contingent nature of the lawsuit and the significant risks undertaken by them in this case. General Motors disputes the propriety of a multiplier on two grounds. First, it asserts that multipliers are never available under the statutory fee provision in the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2). Second, it maintains that, even if a multiplier were available, the facts of this case do not warrant any upward adjustment of the basic lodestar amount.

These actions were commenced and prosecuted under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* A significant portion of the class counsels' time was expended investigating the individual claims to ensure that the Act's 100-plaintiff requirement [*See* 15 U.S.C. § 2310(d)(3)(c)] was fulfilled (*See* Joint Memorandum in Support of Class Counsels' Fee Petitions at 6, 12 n.1, 14 n.2). Plaintiffs sought, and ultimately obtained, class certification under the Magnuson-Moss Act. *See* Interim Order, *Skelton v. General Motors Corp.*, No. 79 C 1243 (N.D. Ill. December 20, 1984). Under these circumstances, even if the fee award is based on the common fund doctrine, any limitation contained in the Magnuson-Moss Warranty Act is a relevant consideration in determining whether to award a "risk" multiplier in this

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[36] The court reduced Mr. Schachter's hours by 4 to reflect time spent traveling to and from Chicago.

case. The structure of the settlement agreement should not divert the court from the Congressional intent underlying the passage of this Act.

Magnuson-Moss permits a court to award a successful plaintiff

> a sum equal to the aggregate amount of costs and expenses (including attorneys' fees *based on actual time expended*) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action. . . .

15 U.S.C. § 2310(d)(2) (emphasis supplied). GM argues that the language underscored above precludes this court from awarding a multiplier in a Magnuson-Moss case. Unlike most fee-shifting statutes, which permits awards of "reasonable" attorneys' fees, this Act appears to place a ceiling on the fees that a court may award a successful plaintiff. The plain language of the statute would seem to preclude any upward multiplier adjustment of the attorneys' fees awarded to a successful plaintiff. In *Ventura v. Ford Motor Co.*, 173 N.J. Super. 501, 414 A.2d 611, 612 (1980), *aff'd*, 180 N.J. Super. 45, 433 A.2d 801 (1981), the court denied a request for a multiplier of four, concluding that, "[a]n attorneys' fee allowance under the Magnuson-Moss Warranty Act is limited to 'actual time expended' but may exceed actual billings to a prevailing party if 'reasonably incurred.'" The court agrees with GM and the *Ventura* court that Section 2310(d)(2) evinces a Congressional intent to limit the fee award to the time actually expended in pursuit of a plaintiff's claim. Accordingly, the court concludes that a plaintiff in a Magnuson-Moss case is not entitled to an upward multiplier adjustment of the fees awarded.

However, even if § 2310(d)(2) does not prohibit a fee award which includes a multiplier, the court finds that the background of this litigation does not justify an in-

crease in the lodestar figures set forth in this opinion. This lawsuit was settled at a relatively early stage of the litigation. In view of the fee rates and hours allowed, this case does not present the exceptional circumstances, the exceptional kind of risk, or the exceptional success that warrants the use of a multiplier.

In the past, courts in both common fund and statutory fee cases have permitted upward adjustments of the lodestar figure to compensate plaintiffs' counsel for the delay in payment, the contingent nature of the lawsuit, superior representation, the risk of litigation and the exceptional quality of the results obtained. *See, e.g., International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1273-74 (8th Cir.), *cert. denied*, 449 U.S. 1063, 101 S.Ct. 787 (1980); *Kamberos v. GTE Automatic Electric, Inc.*, 603 F.2d 598, 604 (7th Cir. 1979), *cert. denied*, 454 U.S. 1060, 102 S.Ct. 612 (1981); *Northcross v. Board of Education*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999 (1980); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); *Phemister v. Harcourt-Brace Jovanovich, Inc.*, 1984-2 Trade Cases ¶ 66,234 at 66,997 (N.D. Ill. 1984). In *Hensley*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940 (1983), the Supreme Court implicitly affirmed this practice holding that

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.

Hensley, 46 U.S. 424, 435, 103 S.Ct. 1933, 1940.

In the past few years, however, the Supreme Court and the appellate courts of this circuit have begun to

question the propriety of awarding a multiplier to the basic lodestar figure. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088 (1986); *Blum v. Stenson*, 104 S.Ct. 1541 (1986); *In re Burlington Northern, Inc. Employment Practices Litigation*, 803 F.2d 279 (7th Cir. 1986); *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986); *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984); *Bonner v. Coughlin*, 657 F.2d 931 (7th Cir. 1981). In *Blum v. Stenson*, the plaintiffs filed a § 1983 class action against the New York State Department of Social Services, challenging the state's method of allocating Medicare Benefits. The case was decided on cross motions for summary judgment after only one set of plaintiffs' interrogatories had been served and answered. *See generally Stenson v. Blum*, 476 F.Supp. 1331 (S.D. N.Y. 1979). The order granting summary judgment certified the class and entered final judgment for the plaintiffs. The Second Circuit affirmed this ruling, and the plaintiffs' counsel then petitioned the district court for an award of attorneys' fees pursuant to 42 U.S.C. § 1988. The district court determined a lodestar amount, and then awarded plaintiffs' counsel an upward adjustment of 50% to reflect "the quality of representation, the complexity of the issues, and the 'great benefit to the large class' that was achieved." *Blum*, 465 U.S. at 891, 104 S.Ct. at 1545, citing *Stenson v. Blum*, 512 F.Supp. 680, 685 (S.D. N.Y. 1981). The Second Circuit affirmed this award, and defendants appealed to the Supreme Court.

The Supreme Court rejected at the outset defendants' argument that a multiplier is never permissable. *Blum*, 465 U.S. at 897, 104 S.Ct. at 1548. It indicated, however, that multipliers should not be granted as a matter of course, and are appropriate only in rare cases which produce exceptional results. The court noted that, "[w]hen . . . the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is *presumed*

to be the reasonable fee contemplated by [the statute]." *Blum*, 465 U.S. at 897, 104 S.Ct. at 1548 (emphasis added).

The Court then analyzed the four reasons that the district court articulated for allowing an enhanced fee award. With respect to the novelty and complexity of the issues, the court held:

> The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates. There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally will be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates. Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award.

Id. at 898, 104 S.Ct. at 1548-1549. Similarly, the Court also held that the "quality of representation is also reflected in the hourly rate, and may justify an upward adjustment "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" *Blum*, 465 U.S. at 899, 104 S.Ct. at 1549. The Court also held that, since the "results obtained" are generally factored into the determination of the lodestar, "it normally should not provide an independent basis for increasing the fee award." *Id.* (footnote omitted). Finally, because plaintiffs had not alleged an enhancement for the risk incurred in litigating this action, the Court held that a multiplier for "risk" was inappropriate. It expressly declined to decide whether

risk of not prevailing could ever justify an enhancement of the fee award. *Id.* at 900 and n. 16, 104 S.Ct. at 1550 and n. 16.

In *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 106 S.Ct. 3088 (1986), the Court reiterated *Blum*'s restrictive approach to multipliers in statutory fee cases. The *Delaware Valley* plaintiffs were awarded a multiplier to reflect the "superior" quality of representation and the contingent nature of the case. Following the position set forth in *Blum*, the Court held that the award of a multiplier for superior representation was clearly inappropriate. It noted:

> A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate —represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, . . . the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws. . . . In short, the lodestar figure includes most, if not all, of the relevant factors comprising a 'reasonable' attorneys' fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

106 S.Ct. at 3098, 3099. The Court reserved ruling on the issue of whether a multiplier can be justified by the risk of loss, and set the matter for reargument next term. *Id.* at 3100.

In the present case, the only grounds on which plaintiffs request a multiplier is the alleged risk of loss. In *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1392 (7th Cir. 1984), the court noted that, "[i]n this circuit, the

risk of losing 'alone does not justify the use of a multiplier,'" *citing Bonner v. Coughlin*, 657 F.2d 931, 936 (7th Cir. 1981). The *McKinnon* court explained its reservations in connection with a "risk bonus":

> The fundamental problem of a risk bonus is that it compensates attorneys, indirectly but effectively, for bringing unsuccessful civil rights suits, even though the attorney's fee statute is expressly limited to cases where the party seeking the fee prevails. . . . Suppose a plaintiff asks for and receives a multiplier of 2 because he had a 50 percent chance of losing the case. This means that if the plaintiff's lawyer tries 10 such cases and wins 5 (as one would expect, if the risk of loss is indeed 50 percent), he will be paid as if he had won them all; that is, he will be paid twice his normal charge for each of the 5 cases he won, to compensate him for getting nothing for the cases he lost. Indeed, if the logic of the risk multiplier were applied consistently, the attorney's fee would be larger the riskier the case, even though this would mean rewarding lawyers for flooding the courts with unmeritorious litigation, something we very much do not need. Imagine a class of cases where only one in 50 plaintiffs prevails. Then the risk multiplier would be 50, and a lawyer who brought all 50 cases and lost 49 would receive the same compensation that he would have received had he been certain to win all 50 cases (in which event there would have been no multiplier, rather than (virtually) certain to lose 98 percent of them.

McKinnon, 750 F.2d at 1392. This concern was recently reiterated in *Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir. 1986) ("One common concern with compensation for risk is that the multiplier should rise as a probability of success falls, soaking the unlucky defendant who had a good case (more than a 50% chance of prevailing but lost anyway and therefore faced a huge multiplier"),

and *In re Burlington Northern, Inc. Employment Practices Litigation*, 803 F.2d 279, 286 (7th Cir. 1986) (Seventh Circuit has not favored the use of risk multipliers). *See generally* Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473 (1981) (listing several other problems associated with upward adjustments to compensate for the risk of not prevailing); Comment, *Nonpayment Risk Multipliers: Incentives or Windfalls?*, 53 U.Chi.L.Rev. 1074 (1986).

This case has been pending before this court since 1982. In the course of these proceedings, the court has had the opportunity to observe the class counsels' vigorous and able representation of the plaintiffs in this case, and has frequently commented on the superior quality of representation on both sides of this case. This litigation undoubtedly involved significant management obstacles, and entailed research into previously uncharted areas of the Magnuson-Moss Warranty Act. Despite the complexities of the case, however, the court finds that a "risk" multiplier is not necessary to fully compensate the class counsel for their representation of plaintiffs in these consolidated cases. Although the litigation has been pending a long time, the action never proceeded very far beyond the initial pleading stages. Some limited discovery was conducted; however, the bulk of the actual discovery on the merits had barely commenced when the parties began discussing the possibility of settlement.

Accordingly, in light of the state in which the parties ultimately settled the case, the court finds that an upward multiplier of the basic lodestar fees is neither necessary nor appropriate. The attorneys' fees that this court has included in its calculation of the lodestar amounts, particularly the allowance derived from current or near current rates for all attorneys, adequately compensates these firms for the "risk" involved in prosecuting this case. *See In re Burlington Northern, Inc. Employment Practices Litigation*, 803 F.2d 279 286-87 (7th Cir. 1986) (award of fees at current rates ameliorates the risk of nonpay-

ment); *Technology Fund, Inc. v. Kansas City Southern Industries, Inc.*, 72 F.R.D. 433, 440 (N.D. Ill. 1976), *In re Penn Central Securities Litigation*, 416 F.Supp. 907, 919 (E.D. Pa. 1976), *rev'd on other grounds*, 560 F.2d 1138 (3d Cir. 1977).

Conclusion

For the reasons set forth above, the court finds that the class counsel are not entitled to an upward adjustment or "risk multiplier" for their pursuit of this litigation. Whether viewed in terms of the Magnuson-Moss Act or the common fund doctrine, the fees calculated in accordance with the principles set forth in this opinion provide the proper amount of compensation to the plaintiffs' attorneys in this case. Accordingly, the court awards the fees and expenses set forth below to the nine law firms who have successfully represented the class in this case:

Attorney	Allowed Rate	Allowed Hours	Total Fees	Paralegals(P) Expenses(E)	Total
Charles A. Boyle & Associates	$190/hr.	1407.57	$ 267,438.30	$ 2,793.00(P) $ 30,763.42(E)	$ 300,994.72
Corinblit & Seltzer					
J. Corinblit	$200/hr.	26.20	$ 12,590.00	-0-(P)	$ 14,321.11
M. Seltzer	$175/hr.	42.00		$ 1,731.11(E)	
Abraham N. Goldman & Assoc., Ltd.					
A. Goldman	$150/hr.	1776.80	$ 269,576.25	$175,193.24(P)	$ 464,414.75
Associates	$75/hr.	40.75		$ 19,645.26(E)	
Goodkind, Weschler, Labaton & Rudoff					
S. Weschler	$220/hr.	18.85	$ 144,962.00	$ 7,278.42(P)	$ 165,264.74
E. Labaton	$220/hr.	2.50		$ 13,024.32(E)	
W. Kass	$200/hr.	16.20			
R. Schacter	$160/hr.	157.50			
L. Sudarow	$150/hr.	40.08			
J. Plasse	$120/hr.	655.35			
M. Isaacs	$70/hr.	69.85			
E. Perry	$70/hr.	302.40			
Others	$85/hr.	13.10			
Frances E. Goodman, P.C.	$120/hr.	307.20	$ 36,864.00	-0-(P) $ 2,510.00(E)	$ 39,374.00
William J. Harte, Ltd.					
W. Harte	$200/hr.	749.80	$ 154,664.75	$165,685.97(P)	$ 331,438.72
Associates	$85/hr.	55.35		$ 11,088.00(E)	

Law Offices of Beverly C. Moore, Ltd.					
B. Moore	$140/hr.	2204.00	$ 310,510.00	$ 43,441.50(P)	$ 396,813.32
Other Attys.	$50/hr.	39.00		$ 42,861.82(E)	
Sachnoff, Weaver & Rubenstein					
L. Sachnoff	$240/hr.	663.60	$ 725,832.40	$ 51,239.44(P)	$ 885,934.97
B. Rosen	$145/hr.	2199.72		$ 93,863.13(E)	
M. Tennenbaum	$125/hr.	28.30		$ 15,000.00(jt.E) (brief)	
M. Denlow	$110/hr.	22.50			
C. Watkins	$135/hr.	2.60			
J. Schumacher	$130/hr.	1763.50			
J. Feldman	$80/hr.	5.46			
D. Morris	$70/hr.	6.20			
M. Kaufman	$90/hr.	23.50			
Zwerling, Schacter & Zwerling					
R. Schacter	$160/hr.	66.56	$ 10,759.60	$ 54.00(P)	$ 13,037.70
J. Zwerling	$160/hr.	.6		$ 2,224.10(E)	
J. Barkhorn	$70/hr.	.2			
TOTALS:			$1,933,197.30		$2,611,593.90

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: February 11, 1987

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 1243

CLASS ACTION

JUDGE JOHN NORDBERG

ARLIE GLEN SKELTON, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs,

—VS—

GENERAL MOTORS CORPORATION,
Defendant.

No. 80 C 2151

JOSEPHINE C. NEWTON, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs,

—VS—

GENERAL MOTORS CORPORATION,
Defendant.

And All Consolidated Actions

[Filed May 1, 1989]

ORDER

Pursuant to the oral opinion of the Court on April 25, 1989, plaintiffs' counsel are awarded a multiplier of 1.6 on the loadstar attorneys' fees previously awarded by this Court. In addition, the Court awards interest on the additional fees from the date of the Court's Order of February 16, 1987, to date, in a total amount of 18% for the entire period.

The prior loadstar attorneys' fees awarded in the Court's Order of February 16, 1987 totaled $1,933,197.30. Additional fees of $56,463.75 were awarded to the Sachnoff firm on March 16, 1987 to correct a clerical error in the February 16, 1987 Opinion, for amended total loadstar fees of $1,989,661.05. Applying the multiplier to these awards results in additional aggregate fees of $1,193,797.00. The interest to be paid on this additional fee is $214,883.00, for a total additional award plus interest of $1,408,679.80.

Further, pursuant to the distribution of these fees to plaintiffs' counsel in the Court's previous Orders, the new award is to be paid out as follows:

Attorney	Prior Loadstar	Additional Fee	Interest (18%)	Total Additional Fees and Interest
Charles A. Boyle & Assoc.	$267,438.30	$160,463.00	$28,883.00	$189,346.00
Corinblit & Seltzer	12,590.00	7,554.00	1,360.00	8,914.00
Abraham N. Goldman & Assoc.	269,576.25	161,746.00	29,114.00	190,860.00
Goodkind, Weschler, Labaton & Rudoff	144,962.00	86,977.00	15,656.00	102,633.00
Frances E. Goodman	36,864.00	22,118.00	3,981.00	26,099.00
William J. Harte, Ltd.	154,664.75	92,799.00	16,704.00	109,503.00
Beverly C. Moore, Ltd.	310,510.00	186,306.00	33,535.00	219,841.00
Sachnoff, Weaver & Rubenstein	782,296.00	469,378.00	84,488.00	553,866.00
Zwerling, Schacter & Zwerling	10,759.60	6,456.00	1,162.00	7,618.00
TOTALS		$1,193,797	$214,883	$1,408,680

General Motors agrees that the foregoing Order accurately sets forth the Court's April 25, 1989 oral ruling, but continues to object to the award of any such multiplier and disputes that any proper finding supporting such an award has been or could be made by the Court. The Court enters said award over the objections of General Motors.

Payment of the foregoing fees are subject to security arrangements acceptable to the Court. Timing of payment shall be set by further order of the Court.

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: April 28, 1989

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 13, 1989

Before HON. WILLIAM J. BAUER, *Chief Judge*
Before HON. RICHARD D. CUDAHY, *Circuit Judge*
Before HON. JOHN L. COFFEY, *Circuit Judge*

Nos. 87-1404, 87-1530 and 87-1610

ARLIE GLEN SKELTON, et al., on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLANTS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE.

Appeal of: Sachnoff, Weaver & Rubenstein, Ltd.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 79 C 1243, 80 C 2151 and 85 C 4805
John A. Nordberg, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by appellee, General Motors Corporation, no judge in active service* requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Circuit Judges Walter J. Cummings and Richard A. Posner did not participate in consideration of this petition.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 13, 1989

Before HON. WILLIAM J. BAUER, *Chief Judge*
Before HON. RICHARD D. CUDAHY, *Circuit Judge*
Before HON. JOHN L. COFFEY, *Circuit Judge*

No. 87-1530

ARLIE GLEN SKELTON, et al., on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLANTS,

v.

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE.

Appeal of: Law Offices of
Beverly C. Moore, Jr., APPELLANT.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division

Nos. 79 C 1243, 80 C 2151 and 85 C 4805
John A. Nordberg, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by appellant, Law Offices of Beverly C. Moore, Jr., and the response thereto by General Motors Corporation, no judge in active service* requested a vote thereon, and all of the judges on

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* Circuit Judges Walter J. Cummings and Richard A. Posner did not participate in consideration of this petition.

the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-771

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 13, 1989.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 27 day of March, 1989.

APPENDIX F

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

AeroVironment Inc. (USA)
Alambrados Automotrices, S.A. de C.V. (Mexico)
Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)
AMBRAKE Corporation (USA)
Applied Intelligence Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avis, Inc. (U.S.A.)
Bujias Mexicanas, S.A. de C.V. (Mexico)
Cableados de Juarez, S.A. de C.V. (Mexico)
CABLESA-Industria de Componentes Electricos Limitada (Portugal)
Calsonic Harrison Co., Ltd. (Japan)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)
Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)
Convesco Vehicles Sales GmbH (West Germany)
Daewoo Automotive Components, Ltd. (Korea)
Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)
Delmex de Juarez, S.A. de C.V. (Mexico)
Delredo, S.A. de C.V. (Mexico)
Detroit Deere Corporation (USA)
Detroit Diesel Corporation (USA)
DHB—Componentes Automotivos S.A. (Brazil)
DHMS Industries, Ltd. (Korea)
Diffracto Limited (Canada)
DR DE CHIHUAHUA, S.A. de C.V. (Mexico)
Ensamble de Cables Y Componentes, S.A. de C.V. (Mexico)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)
General Motors do Brasil, Ltda. (Brazil)
General Motors de Colombia S.A. (Colombia)
General Motors del Ecuador S.A. (Ecuador)
General Motors de Mexico, S.A. de C.V. (Mexico)
General Motors Egypt, S.A.E. (Egypt)
General Motors Espana, S.A. (Spain)
General Motors (Europe) AG (Switzerland)
General Motors France (France)
General Motors Hellas, A.B.E.E. (Greece)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
General Motors del Peru S.A. (Peru)
General Motors de Portugal, Limitada (Portugal)
Genie Mecanique Zairose, S.A.R.L. (Zaire)
GM Allison Japan Limited (Japan)
GMFanuc Robotics Corporation (USA)
Hua Tung Automotive Corporation (Rep. of China)
IBC Vehicles Limited (England)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
Metal Casting Technology, Inc. (USA)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
NHK Inland Corporation (Japan)
Omnibus BB Transportes, S.A. (Ecuador)
Packard Electric Ireland Limited (Ireland)
Promotora de Partes Electronics Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Rimir, S.A. de C.V. (Mexico)
Rio Bravo Electricos, S.A. de C.V. (Mexico)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sistemas Electricos y Commutadores, S.A. de C.V. (Mexico)
Sung San Company, Ltd. (Korea)
Suzuki Motor Co., Ltd. (Japan)
Tactical Truck Corporation (USA)
Teknowledge, Inc. (USA)
TEREX Equipment Limited (Scotland)
Vauxhall Motors Limited (England)
Vestiduras Fronterizas, S.A. de C.V. (Mexico)
View Engineering (USA)
Volvo GM Heavy Truck Corporation (USA)

No. 88-1848

(2)

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ARLIE GLEN SKELTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

LOWELL E. SACHNOFF
Counsel of Record
JEFFREY A. SCHUMACHER
GARY S. CAPLAN
SACHNOFF & WEAVER, LTD.
30 S. Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000
Counsel for Respondents

Pandick Midwest, Inc., Chicago • (312) 733-6000

QUESTIONS PRESENTED

Whether GM, with no economic stake in the attorneys' fee issue it seeks to raise, has standing to petition for certiorari.

Whether review by this Court of an attorneys' fee award of a 1.6 risk multiple out of a common fund is warranted when there is no conflict among the Circuits and the Seventh Circuit's decision is consistent with the decisions of this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ARLIE GLEN SKELTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 860 F.2d 250 (1988).

JURISDICTION

On June 1, 1989, the Clerk of the Supreme Court extended the time for filing a brief in opposition to the petition for a writ of certiorari to and including July 14, 1989. GM attempts to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) (1982). However, this case is not properly before this Court because GM lacks standing to bring its petition for a writ of certiorari.

STATEMENT OF THE CASE

Beginning in 1976 and continuing through 1979, General Motors Corporation ("GM") equipped large numbers of its automobiles with defective THM 200 transmissions. These transmissions failed at an alarming rate—some models expe-

rienced failure rates in excess of 40%. In 1979, the underlying litigation was brought as a class action alleging a wide range of claims including violations of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1982) ("Magnuson-Moss" or the "Act"), various state consumer protection statutes and common law claims. Plaintiffs sought damages for a class of consumers who purchased GM automobiles with defective THM 200 transmissions and suffered actual monetary losses from transmission breakdowns. After six years of extensive discovery, after a national class of injured consumers was certified, after GM's numerous motions to dismiss were denied and when the litigation was headed toward a trial date, GM settled its liability to the plaintiff class by creating a settlement fund of $19.5 million ($17 million cash plus a reserve cash fund of $2.5 million). GM further agreed to bear the costs of two individual first class notices mailed to over three million potential class members. The total value of the settlement, including the costs borne by GM, was in excess of $21 million. The background of the litigation is described more fully in the decisions below.

The settlement preserved for GM a potential reverter from the settlement fund, but only if class members' claims did not exceed certain predetermined amounts. As it turned out, class members' claims, fees awarded to plaintiffs' counsel and expenses of administration fully exhaust the cash settlement fund, whether or not counsel receive a multiple.

In February 1987, the district court awarded fees of $1,989,661 out of the settlement fund to the lawyers representing the plaintiff class. In making this award, the district court first reduced counsels' lodestar fees by more than $800,000 and also denied any enhancement for the risk of nonpayment. *Skelton v. General Motors Corp.*, 661 F. Supp. 1368 (N.D. Ill. 1987), *aff'd in part and rev'd in part*, 860 F.2d 250 (7th Cir. 1988). In October 1988, the Seventh Circuit reversed the denial of any enhancement for risk and

remanded the case to the district court to determine whether there was risk of nonpayment when the litigation began, and if so, what if any risk multiple should be awarded to plaintiffs' counsel. *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988). GM sought rehearing and rehearing en banc, and both were denied with no judge voting to rehear the case.

On remand to the district court, there was extensive briefing on the issue of whether a risk multiple was appropriate in this common fund case. In February 1989, plaintiffs' counsel introduced as evidence the affidavits of eight prominent attorneys representing a cross section of the bar, ranging from the largest commercial firms to small public interest practitioners. App. at 1a-27a. These affidavits demonstrated that plaintiffs in a large contingent fee class action would have substantial difficulty finding competent counsel to represent them in this area without the prospect of some enhancement for risk above their regular rates. GM offered no evidence of any kind to counter the affidavits produced by plaintiffs' counsel.

After several hearings and considering the affidavits submitted by plaintiffs' counsel, the district court made specific findings including: (i) there were risks of nonpayment when the litigation began; and (ii) without the prospect of some fee enhancement for the risks of nonpayment, plaintiffs would have had substantial difficulty in retaining counsel in a contingent class case in this market (App. at 29a). Based on these specific findings, the district court awarded plaintiffs' counsel a risk multiple of 1.6 applied to their reduced lodestar fees previously awarded. Because GM elected not to seek a stay of the court of appeals' mandate or any of the orders of the district court, final distributions have been made to all class members and all fees and expenses to plaintiffs' counsel have been paid. The entire settlement fund has been paid out, and as the district court has stated and GM cannot deny, GM has no possible reverter from the settlement fund because any amounts returned if the multiple award is reversed would

be paid to the class, not GM. Thus, GM has no economic stake in the issue for which it seeks review in this Court.

With all distributions made and the settlement fund fully exhausted, 64,828 plaintiff class members received payments averaging $264 each before legal fees, or approximately 77% of their eligible repair expenses related to defective THM 200 transmissions. With the risk enhancement of 1.6 allowed by the district court, plaintiffs' counsel have been paid a total of $3,183,458 in legal fees, or approximately 15% of the total value of the settlement to the plaintiff class.

GM filed its petition for a writ of certiorari on May 12, 1989. On May 23, 1989, the district court made the additional factual finding that "without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market." App. at 29a. Thus, GM's petition did not address the fact that respondents satisfied the requirements of *Delaware Valley II*, as well as those applicable to common fund cases. On May 26, 1989, GM appealed the order in which the district court awarded the 1.6 multiple. A motion to dismiss this appeal based upon the provisions of the settlement agreement has been filed and is pending before the Seventh Circuit.

REASONS FOR DENYING THE WRIT

I. Because GM Has No Economic Interest In This Appeal, It Lacks Standing To Bring Its Petition For Certiorari

GM lacks standing to bring its petition for certiorari. Any reversal of the lower court decision will have absolutely *no impact on GM*. If the multiple were overturned, GM would receive not one cent nor would any ruling or order which has any impact on GM be changed. Any increase in the fund would go exclusively to class members.

GM is pursuing this petition because it is opposed to any precedent supporting fee awards and it is in GM's interest to make fee awards as difficult as possible for plaintiffs' attorneys. However, in connection with the settlement, GM bargained for and received a blanket release including any liability for attorneys' fees. Now, with no direct interest in the proceeding, GM is in effect petitioning for certiorari as an *amicus curiae.* While an *amicus curiae* may support or oppose an action by this Court, it cannot seek to have the Court act on its own behalf. That is exactly what GM is attempting to do.

GM had the potential for standing in the district court because of its possible reversionary interest in the settlement fund. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 481 n.7 (1980). But GM no longer has an economic stake in the action. Any possible reversionary interest by GM in the settlement fund has been foreclosed by claims already made against the fund. The fee issue is moot as to GM, and GM has "no cognizable interest in further litigation between the class and its lawyers over the amount of the fees ultimately awarded from money belonging to the class." *Id. See also Copeland v. Marshall,* 641 F.2d 880, 905 n.57 (D.C. Cir. 1980) ("In 'common fund' cases, the losing party no longer continues to have an interest in the fund; the contest becomes one between the successful plaintiffs and their attorneys over division of the bounty."). Absent any " 'colorable claim for the return of [any] excess,' " GM "has no more standing to press its appeal than would a losing defendant have standing to contest the division of an award between plaintiff and his attorney pursuant to a contingent-fee arrangement." *Boeing,* 444 U.S. at 488, 489 n.4 (Rehnquist, J., dissenting).

Standing under Article III of the U.S. Constitution requires that a party who seeks to invoke a federal court's jurisdiction show that: (i) he or she personally has suffered some actual or threatened injury, economic or otherwise; (ii) the injury " 'fairly can be traced to the challenged action' ";

and (iii) the injury is likely to be redressed by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). An actual live controversy must exist at all stages of litigation, not merely at the time the complaint is filed. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *De Funis v. Odegaard*, 416 U.S. 312, 319 (1974). GM satisfies none of these requirements.

Nor is GM a proper party to pursue this petition on behalf of the class. While GM purports to represent the interests of the thousands of persons it injured in selling cars with defective transmissions (Pet. at 9), its interests in fact are quite opposite. GM's position has been adverse to the class throughout the nine year course of this litigation. GM does not represent the class, nor can it seek certiorari on behalf of the class. A petitioner "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). *See also United States v. SCRAP*, 412 U.S. 669, 687 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

In federal common fund litigation, it is the district court, not the defendant, that has the "special obligation to ensure that the fee is fair." *Copeland*, 641 F.2d at 905 n.57. The district court here recognized and fulfilled this obligation: "[T]he Court . . . is now in a position of representing the class in a sense because General Motors has agreed to pay out and will pay out the full amount . . . ." App. at 31a. Moreover, no member of the only "party" with proper standing—the class itself—filed objections to the fee awards or has supported GM in its arguments in the court of appeals or in this Court. Nor has any class member obtained additional counsel with which to litigate this issue. The absence of any class support for GM's position is not surprising; the class of over 64,000 claimants received the benefits of one of the largest and most successful class recoveries in recent years.

GM's sudden concern for the class it battled against so staunchly rings hollow. GM cannot don the class's mantle, just as it cannot claim any economic stake in the fee issue it now presses. What it boils down to is that GM has no standing, and a petitioner "who [does] not possess Article III standing may not litigate as [suitor] in the courts of the United States." *Valley Forge Christian College*, 454 U.S. at 475-76.

II. Statutory Fee Provisions And The Common Fund Doctrine Are Two Distinct Legal Theories To Which Courts Apply Different Standards For Decision; GM Fails To Address This Point

Contrary to GM's assertion, this case does not concern the award of fees to the *plaintiffs* from the defendant GM under the Magnuson-Moss Act. Rather, plaintiffs' *counsel* were awarded fees from the plaintiff class through a common fund settlement established by counsels' efforts. In common fund cases, the court employs its equitable powers to divide the gain obtained through counsels' efforts. In statutory fee-shifting cases, the court enforces an explicit congressional intent to ensure compliance and impose an additional penalty on the defendant. The statutory fee and common fund doctrines are not substitutes for one another; they are separate rules for separate situations governing the relative rights of different sets of parties. A failure to draw this basic distinction pervades GM's petition.

Although this case commenced under several distinct legal theories—only one of which was the Magnuson-Moss Act—it ended with a class recovery for all the claims to which the common fund doctrine applies. Once the common fund was created through the settlement of a wide range of claims, it became the obligation of the district court to award attorneys' fees from the fund based upon its equitable powers. *Boeing*, 444 U.S. at 478; *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970); *Sprague v. Ticonic Nat'l Bank*, 307

U.S. 161, 166 (1939).[1] To award attorneys' fees from a common fund "is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills*, 396 U.S. at 396-97.[2]

This Court has distinguished statutory fee cases from common fund cases. The common fund doctrine has been described as operating "in addition to" statutory fee provisions. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 n.6 (1986). Statutory fee cases are also distinguishable from cases "where any plaintiff, impecunious or otherwise, has a damages case that competent lawyers would take in the absence of fee-shifting statutes." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 726 (1987) ("*Delaware Valley II*"). In *Blum v. Stenson*, 465 U.S. 886, 900 n. 16 (1984), Justice Powell also recognized that "reasonable fees" under statutory authority and the common fund doctrine are not the same.

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[1] The fact that this action was commenced, in part, under a statute with a fee-shifting provision does not, as GM maintains, preclude an award under the common fund doctrine. To the contrary, when a case is "settled by the creation of a fund in exchange for the release of the defendants from liability both for damages and for statutorily authorized fees," it is converted into a common fund case. *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 582 (3d Cir. 1984). *See also* THIRD CIRCUIT TASK FORCE, *Court Awarded Attorney Fees* (1985).

[2] By its terms, the Magnuson-Moss Act is inapplicable to an award of fees from a common fund. The fee award provision of the Act provides:

> If a *consumer* finally prevails in any action brought under paragraph (1) of this subsection, *he* may be allowed by the court to recover *as part of the judgment* a sum equal to the aggregate amount of cost and expenses. . . .

15 U.S.C. § 2310(d)(2) (1982) (emphasis added). Any award of fees under the Act is payable to the *consumer* from the *defendant*. Plaintiffs' counsel had no standing to seek and the district court had no authority to award fees "under" the Magnuson-Moss Act.

GM relies almost exclusively on decisions which involve statutory fee awards. *Delaware Valley II*, the case upon which GM places chief reliance, is a statutory fee case. However, there is no hint anywhere in the opinions of the four-justice plurality, Justice O'Connor's concurrence or the four-justice dissent that the issues involved in *Delaware Valley II* have any bearing on the propriety of a risk multiplier in a common fund case. More to the point, GM is incorrect in its assertion that the same legal standards govern common fund and statutory fee cases. GM does not provide any analysis why the same or similar standards should apply to rights arising from totally different legal foundations (statutory vs. equitable) and in which divergent and conflicting considerations of policy and fairness are called into play.[3] Statutory fee provisions impose what amounts to a penalty on the defendant in order to assure compliance with certain statutes; the fees are awarded to the plaintiffs, not their lawyers. The purpose of the common fund doctrine is to impose and spread costs (including risk) on those who reap the benefits.

The principal objections to risk multipliers which have been raised in statutory fee cases are nonexistent in common fund cases. The use of multipliers in statutory fee-shifting cases, courts fear, may conflict with the statutory requirement that fees be awarded only to "prevailing parties" by compensating attorneys indirectly for prior cases which they did not win. *See Delaware Valley II*, 483 U.S. at 725. Fees paid by the plaintiffs as a result of the common fund doctrine face no such statutory prescription and do not involve any statutory interpretation. Courts are also concerned that an award of risk multiples under fee-shifting statutes will penalize the unlucky defendant who initially had a strong case but lost

[3] After a thorough analysis of court awarded fees, the Third Circuit Task Force concluded: "The Task Force believes that a distinction must be drawn between fund-in-court cases and statutory fee cases since the policies behind the two categories differ greatly." *Court Awarded Attorney Fees* at 13.

anyway. *Id.* at 722. However, awarding a risk multiple in a common fund case increases the return to the attorneys who bore the risk, but only at the expense of the plaintiffs for whose benefit the risk was undertaken. This is in stark contrast to the anomalous result posited by GM in statutory fee cases where the defendant pays for the risk the attorneys undertook on plaintiffs' behalf—and arguably pays a higher premium when its position was more defensible in the first place.

The distinction between the parties in interest also underscores the basic fallacy of GM's argument that no multiple would be available if plaintiffs' counsel had tried the case. If this case had gone to trial with a final judgment for the plaintiff class on a fee-shifting claim in the aggregate amount of $20 million, counsel, *on behalf of the plaintiffs,* would have sought an award of fees *from* GM in addition to the actual damages of $20 million. Suppose the fee award, as per the four-justice plurality in *Delaware Valley II,* was $2,000,000 with no risk multiple. Counsel for the class have no fee agreement with class members—they never do in class actions. Under Magnuson-Moss, the $2,000,000 fee would belong to the plaintiff class members, not to counsel. Counsel would then petition the court for an award of fees *from the entire fund* of $22 million including damages *and* statutory fees. An award of fees from the total fund of $22 million would be made under the common fund doctrine and the award of fees to counsel from the fund would not be limited to the statutory fees awarded from the defendant. [4] Though

[4] The Seventh Circuit in *McKinnon v. City of Berwyn,* 750 F. 2d 1383, 1393 (7th Cir. 1984), recognized the distinction between the "reasonable" fees awardable to a *plaintiff* under a statutory fee provision and the amount which *plaintiffs'* attorneys are entitled to receive if they prevail to a litigated judgment:

> Suppose the contingent fee were 40 percent of the sum of the damages and attorney's fees awarded (as is common), and the jury awarded $100,000 in damages and the judge awarded $20,000 in attorney's fees (without consideration of a possible risk multiplier), thus entitling the plaintiff's attorney to a total fee of $48,000—more than twice the reasonable attorney's fee calculated by the judge.

counsel and the class may have adverse interests in allocating the fund, they have the same fundamental interest—maximizing the total amount of the fund.

In contrast to risk enhancement under statutory fees, the common fund doctrine correctly aligns risk and return. Class counsel are given a higher return by reducing the recovery of the plaintiffs whom they represented on a contingent basis. Plaintiffs' counsel undertook risk for the benefit of plaintiffs and plaintiffs "pay" for that risk taken by receiving a smaller amount from the fund. The defendant is indifferent, since it pays the same amount whether or not plaintiffs were represented on a contingent basis. The defendant bears the penalty and the risk of statutory fees but not the risk that plaintiffs were represented on a contingent basis. That risk is borne by plaintiffs through a risk multiple if suit is successful, and by their attorneys if it is not.

Risk multipliers in common fund cases, where the premium is paid by the plaintiff class, are analogous to the fees paid to lawyers in common law tort contingency fee cases. As in common fund cases, the attorney is compensated for bearing an additional risk, risk that would otherwise be carried by clients who pay as they go. The heart of the request for a risk multiplier in a common fund situation is the contingent nature of the attorney's fee arrangement with his or her clients. The attorney requests reasonable compensation for assuming the risk of nonpayment, *i.e.*, for making a risky loan of services to the client. Judge Posner has accurately explained the nature of the contingent arrangement:

> A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans, and the total amount of interest is large not only because the interest rate is high but

> because the loan may be outstanding for many years—and with no periodic part payment, a device for reducing the risk of the ordinary lender.

R. POSNER, ECONOMIC ANALYSIS OF LAW § 21.9 at 534-35 (3d ed. 1986). The multiplier is commensurate with the risk of the loan the attorney is making to his or her client. It is in effect a nonrecourse loan to the client, a loan which economically requires a premium—but a premium payable by the client.

Contrary to GM's assertion, the Seventh Circuit's opinion does not require the award of a risk multiple in a common fund case; it simply instructs a trial court to determine with specific findings whether there was sufficient risk of nonpayment to justify a multiple. *Skelton,* 860 F.2d at 258. Thus, risk multiples would be improper where no appreciable risk of nonpayment is present at the start of the litigation, and where there would be little if any difficulty retaining counsel, *e.g.*, a civil antitrust suit where the defendant had already been found guilty in a criminal trial.[5]

GM does not, and cannot, cite even one decision of this Court—or for that matter any other federal court—that holds that enhancement for risk is, as a matter of law, impermissible in a common fund case. GM simply wishes to discourage *any* consumer litigation against it—by making it virtually impossible for competent counsel to take these cases.[6]

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[5] Courts awarding attorneys' fees in common fund cases after *Delaware Valley II* have denied any multiple in appropriate situations. *See, e.g., Schwartz v. Novo Industri A/S,* 119 F.R.D. 359 (S.D.N.Y. 1988); *In re Wicat Sec. Litig.*, 671 F. Supp. 726 (D. Utah 1987).

[6] The position of plaintiffs' lead counsel, Sachnoff & Weaver, supports this point. Sachnoff & Weaver is a 90 person law firm with an active commercial practice, including corporate, securities, real estate, tax and probate as well as a diverse litigation practice. Our firm would not have taken part in a complex contingent fee ten-year lawsuit against the world's largest industrial corporation with its phalanx of skillful and tenacious lawyers without the prospect of some risk enhancement.

III. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF ALL CIRCUITS THAT HAVE ADDRESSED THE ISSUE

The Seventh Circuit's decision is neither novel nor ground-breaking. Rather, the Seventh Circuit's narrow holding that in common fund cases a multiple based on the risk of nonpayment *may* be appropriate, in certain circumstances and only if based upon specific findings by the trial court, is fully consistent with the decisions of all circuits that have addressed the issue of common fund fee awards.

The lodestar/multiple approach to fee awards in common fund cases was first articulated by the Third Circuit in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), *aff'd in part and vacated in part*, 540 F.2d 102 (3d Cir. 1976) and *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) ("*Lindy II*"). The *Lindy II* court found that in addition to the lodestar, a reasonable attorneys' fee award in a common fund case included a reflection of the contingent nature of success—"[t]he probability or likelihood of success, viewed at the time of filing suit." 540 F.2d at 117. The Third Circuit has consistently affirmed the rule of law set forth in the *Lindy* decisions regarding common fund fee awards. *See, e.g., In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984). The Seventh Circuit's decision wholly conforms with the *Lindy* decisions.

The Second Circuit specifically adopted the *Lindy* analysis in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974). In *Grinnell*, the settlement of a national antitrust class action resulted in a common fund. The Second Circuit held that the lodestar fee could be enhanced based on the "risk of litigation." *Id.*

The law in the Eighth Circuit is the same. In *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 128 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975), an antitrust class action resulting

in a common fund, the Eighth Circuit also applied a risk analysis test: "The *Lindy* standards as interpreted in *City of Detroit* . . . provide the appropriate test for determining any discretionary fee award in a class action context."

In *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980), where the settlement of a class antitrust action resulted in a common fund, the Fifth Circuit utilized the same approach. Relying upon *Lindy, Grinnell* and *Grunin,* the court determined that the fee award should be determined under the lodestar analysis, and thereafter modified to take into account "the contingent nature of success." 624 F.2d at 583 n.15. In a subsequent decision, the Fifth Circuit adopted the common fund fee award analysis based on risk and clarified the meaning of the "contingent nature of success" as "the probability or likelihood of success, viewed at the time of filing suit." *Graves v. Barnes,* 700 F.2d 220, 222 (5th Cir. 1983) (quoting *Lindy II,* 540 F.2d at 117).

The Ninth Circuit has applied the same reasoning to common fund fee award decisions. In *Loring v. City of Scottsdale,* 721 F.2d 274, 276 (9th Cir. 1983), the Ninth Circuit remanded a district court's fee award in a common fund case with instructions to determine "whether some multiplier is justified by the contingent nature of the case."

The law in the District of Columbia Circuit regarding multiples in common fund cases is also consistent. "With regard to the contingent nature of success, it may be appropriate in some circumstances to compensate counsel for the risk as seen at the start of the litigation that the suit would be unsuccessful and that no fees would be forthcoming." *Bebchick v. Washington Metro. Area Transit Comm'n,* 805 F.2d 396, 403 (D.C. Cir. 1986).

The uniformity in this area is striking. GM does not, and cannot, cite any authority disputing the uniformity of decisions of all federal courts discussing the issue of attorneys' fees in cases with common fund recoveries, most of which

began under fee-shifting statutes.[7] The reason is clear. The court of appeals decision here is consistent with the decisions of all courts that have addressed the common fund fee award issue.[8]

IV. The Unique Facts And Circumstances Of This Case Support The Risk Multiple Awarded

The district found that this was a "unique case" (App. at 40a) which delved "into previously uncharted areas of the Magnuson-Moss Warranty Act." *Skelton*, 661 F. Supp. at 1380. These unique facts and the district court's findings (both written and oral) based upon the extensive factual record before it overwhelmingly support the allocation of the common fund to include the modest 1.6 multiple for plaintiffs' counsel. A full exposition of the risks and facts presented to the district court is beyond the scope of this brief. However,

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[7] GM seriously miscites *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988). Pet. at 14-15. Respondents contacted plaintiffs' counsel in *Norman* who confirmed that the court in *Norman* awarded fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), which were payable *by the defendant*, not out of any fund. *See* App. at 34a-38a. Similarly, *Student Pub. Interest Research Group, Inc. v. AT&T Bell Laboratories*, 842 F.2d 1436, 1438 (3d Cir. 1988), "involve[d] an appeal and cross appeal from an order of the district court awarding counsel fees to prevailing parties (two public interest groups) pursuant to the fee shifting provisions of the Clean Water Act . . . ."

[8] Although other circuits have not squarely addressed risk multiples in common fund cases, the district courts in those circuits have long recognized that multiples based upon the risk of nonpayment may be appropriate. *See, e.g.*, (1st Cir.): *Pavlidis v. New England Patriots Football Club, Inc.*, 675 F. Supp. 707, 709 n.1 (D. Mass. 1987); (4th Cir.): *Edmonds v. United States*, 658 F. Supp. 1126, 1148 (D. S.C. 1987); (6th Cir.): *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 640 F. Supp. 697, 702-03 (S.D. Ohio 1986); (10th Cir.): *Brewer v. Southern Union Co.*, 607 F. Supp. 1511, 1531 (D. Colo. 1984); (11th Cir.): *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 700-02 (M.D. Ala. 1988).

counsel did represent plaintiffs on an entirely contingent basis. Plaintiffs would not have paid their counsel any fee, either directly or through a fund, if a recovery had not been obtained. This was not an idle supposition in the case at bar. To counsel's knowledge, this case was the first nationwide product defect case *ever* certified. The district court itself found that this case involved "great uncertainty" and that "it would be difficult to have great assurance as to what the ultimate verdict" would be. App. at 43a-44a, 47a.

Moreover, the total fees awarded are fair and reasonable when viewed as a percentage of the recovery. The lodestar fee award of $1,989,661, adjusted by a multiple of 1.6, resulted in total legal fees of $3,183,458, just 15% of the $21 million total value of the settlement. This Court in *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), recognized the propriety of using the percentage of recovery method as a guideline in determining the reasonableness of fees in common fund cases. Even with the 1.6 multiple, the class here was assessed a fee of 15%, substantially less than the market rate for contingent fees. Class members could not have retained attorneys to press their individual claims against GM for anywhere close to a 15% contingent fee.

V. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE DECISION IN *DELAWARE VALLEY II* OR ANY OTHER DECISION OF THIS COURT

In its zeal to chill any litigation against it for marketing defective products, such as its THM 200 transmission, GM has distorted the holding and the opinions of this Court in *Delaware Valley II* beyond all recognition. Furthermore, plaintiffs' counsel have satisfied even the more stringent requirement for a risk multiplier under statutory fee-shifting cases set forth in *Delaware Valley II*, a fact which completely

undermines GM's claimed justification for obtaining certiorari.[9]

In *Delaware Valley II*, a plurality of four justices, plus Justice O'Connor in her concurrence, held that under the facts *of that case* and analyzed under the fee-shifting statute involved, a risk multiplier was not appropriate. 483 U.S. at 734. In the plurality opinion four justices concluded that in *fee-shifting* cases risk multiples were not appropriate. *Id.* at 727. Alternately, the plurality held that in exceptional cases, where risk enhancement may be appropriate, it should be small and in any event based on a finding that without risk-enhancement the plaintiff "would have faced substantial difficulties in finding counsel" in the local market. *Id.* at 733. Four justices dissented, contending that Congress did not intend to prohibit risk multiples, and that the availability of risk multiples under proper circumstances was essential to the statutory scheme under most fee-shifting statutes. *Id.* at 755. Justice O'Connor agreed with the dissent regarding Congress's intent, and concluded that before adjusting for risk, the trial court must find that without enhancement for risk plaintiffs would have faced substantial difficulties finding counsel in the relevant market. *Id.* at 731, 733.

What emerges from a correct analysis of the Court's opinions in *Delaware Valley II* is not GM's distorted charac-

[9] While the perspectives are different, with statutory fee cases focusing on congressional intent and common fund cases on fairness between the class and their counsel, the standards in each case are, in significant measure, two sides of the same coin. In common fund cases the court is really assessing whether the risk undertaken merits compensation, *i.e.*, hypothetically if the plaintiffs had gotten together, would the "market" have required them to pay a premium for taking the case on a contingent basis. In statutory fee cases the inquiry is somewhat more complex and restrictive—because the multiple is being extracted from the defendants, not the plaintiffs, and the statute only allows fees for prevailing parties. Still, the inquiry is essentially the same—would the "market" demand a risk multiple in order to provide representation to the plaintiffs?

terization, but that five justices would allow a risk multiple in fee-shifting cases under appropriate circumstances, and even the four-justice plurality, in its alternate position specifically endorsed by Justice O'Connor, would also allow enhancement for risk.

Plaintiffs' counsel here took the extraordinary step of satisfying the exact standard articulated by Justice O'Connor in her concurrence as if this case were a statutory fee-shifting case—which it is not. The detailed affidavits submitted by counsel demonstrate that the plaintiffs here would have encountered substantial difficulties in retaining counsel without the prospect of a risk enhancement if successful. The district court, relying on these unrefuted affidavits and its own knowledge and experience, made a specific finding that more than satisfies the propriety of a risk multiple even if this had been a statutory fee-shifting case. In its order of May 23, 1989, the district court, after hearing GM's objections on the record, found "that without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market." App. at 29a. It is telling that although it had four months to do so, GM was unable to produce one shred of evidence, not a single affidavit, to rebut the truth of plaintiffs' counsel affidavits or the correctness of the district court's finding.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LOWELL E. SACHNOFF
Counsel of Record
JEFFREY A. SCHUMACHER
GARY S. CAPLAN
SACHNOFF & WEAVER, LTD.
30 S. Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

Counsel for Respondents

July 14, 1989

Appendices

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendants.

No. 79 C 1243
Class Action
Honorable John Nordberg

JOSEPHINE C. NEWTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendants.

No. 80 C 2151

AFFIDAVIT OF DOUGLASS W. CASSEL, JR.

DOUGLASS W. CASSEL, JR. on oath states as follows:

1. I am a 1972 graduate of Harvard Law School. I was admitted to the Bar of the State of Maryland in 1972, and in 1976 I was admitted to the Bar of the State of Illinois. I have practiced continuously in the Chicago legal community since that time.

2. I am presently on a four month leave as General Counsel of Business And Professional People for the Public Interest ("BPI"), a nonprofit law center in Chicago, whose attorneys work on a broad range of public interest legal

matters including civil rights, civil liberties, consumer and environmental law among other fields, in which attorneys' fees are often awardable to a prevailing plaintiff pursuant to various statutory authorizations. In connection with my work at BPI, I have been extensively involved for the last 13 years in class action and test case litigation before federal and state courts and administrative agencies in Chicago, including actions under federal statutes such as the Civil Rights Act and federal environmental laws. In connection with such matters, I have worked extensively with many attorneys in private practice in the Chicago area on both sides of such litigation, including numerous efforts undertaken by me and other BPI attorneys to recruit volunteer assistance from the private bar.

3. BPI is a not-for-profit corporation and is supported principally by donations from supporters. Accordingly, the criteria employed by BPI in deciding whether or not to undertake litigation are substantially different from that of private practitioners. BPI undertakes representation of cases based upon our assessment of the public importance of the litigation (as well as other factors such as the likelihood of success and the availability of alternative representation, if any, for the litigant), without regard to remuneration in the event that the litigation is successful. I understand, however, that private practitioners do not and cannot afford to select their cases based on the same criteria.

4. Based on my experience with members of the Chicago Bar, I have come to have what I believe to be a reliable understanding of the principal factors that private practitioners consider in determining whether to undertake the representation of plaintiffs in complex civil litigation on a contingent fee basis. In my experience, private practitioners in the Chicago area do not undertake the representation of plaintiffs in complex civil litigation on a contingent fee basis unless those practitioners believe that they have a strong likelihood of receiving substantially more than their normal

hourly rates in the event that they prevail. While private practitioners quantify the hourly-rate enhancement differently depending on various facts and circumstances, the private practitioners with whom I am familiar typically require an expectation of two or more times their normal hourly rates in order to undertake complex civil litigation on a contingent fee basis.

5. Various federal statutes and causes of action provide for the payment of attorneys' fees either through express provisions in the statutes or through the Equal Access To Justice Act. Because of a growing perception of a reluctance of the federal courts in this circuit to award attorneys for prevailing parties in such cases fees commensurate with the substantial risk and delay in payment involved in undertaking such matters, BPI has received an increasing number of requests for representation in the last few years from persons unable to find counsel willing to undertake substantial litigation on a contingent fee basis. Because BPI has very limited resources and there are usually few other relevant nonprofit agencies, if any, we are increasingly having to turn away clients without referring them to any other office or attorney willing to take their case.

6. It is my belief that a plaintiff in the Chicago legal community wishing to bring a complex civil action would face substantial difficulty in finding competent counsel in the private bar to undertake such representation on a contingent fee basis unless there is, in the view of counsel, the reasonable expectation of receiving compensation substantially more than their normal hourly rates.

/s/ DOUGLASS W. CASSEL, JR.
DOUGLASS W. CASSEL, JR.

SUBSCRIBED and SWORN
to before me this ____ day of
February, 1989.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 79 C 1243 Class Action Honorable John Nordberg
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

AFFIDAVIT OF PAUL E. SLATER

I, Paul E. Slater, being first duly sworn, state as follows:

1. I am a partner with the law firm of Sperling, Slater & Spitz in Chicago, Illinois. I have been admitted to practice in the courts of Illinois and in the Federal District Court for the Northern District of Illinois since 1970.

2. From September 1970, to September 1971, I was on the faculty of the University of California Law School (Boalt Hall), Berkeley, teaching legal writing and civil procedure. From September 1971, to September 1972, I was an assistant professor of law at the University of Connecticut School of Law, and from September 1972, to January 1976, I was assistant and then an associate professor of law teaching

antitrust law at Northwestern University Law School. In January 1976, I resigned my appointment to the full time regular faculty at Northwestern and commenced the private practice of law. I have remained, however, as an adjunct professor of antitrust law at Northwestern and teach courses in antitrust practice and procedure at Northwestern in the second semester of each year.

3. Since entering private practice 13 years ago, my practice has been exclusively in the area of complex business litigation and in particular, antitrust cases. I am familiar with the market for legal services in large, complex cases.

4. Our firm has been asked to take cases in this area on a contingent fee basis on behalf of plaintiffs where our fee would be dependent on the success of the litigation. In assessing whether to take a case on a contingent basis, our firm is guided by what we perceive to be the extreme riskiness of legal claims in this area of the law. Even in a case which we believe to be fundamentally sound, we will ask as our fee for a portion of any judgment in favor of our client which corresponds roughly to a 3.0 multiplier of our best estimate of our usual hourly rates for the work necessary on the case. We find that a multiplier of this magnitude is necessary because of the risk of non-payment; the risk that the facts will develop differently or in addition to the facts of which we are first advised; the risk that the law will change before the case is resolved; and the risk that even if we ultimately prevail, we may have to wait 10 years or more before we realize any compensation for our efforts.

5. We usually attempt to translate the anticipated multiplier into a percentage of the judgment based upon our evaluation of the prospect of success and the size of any likely judgment. Typically, we seek anywhere from 25% to 40% of the judgment in order to provide the return necessary to induce us to take a complex case on a contingent fee basis. Even then we politely decline to take the vast number of contingent fee cases offered to us.

6. In my experience, other firms in Chicago would only accept similar contingent fee cases based on contingent fee arrangements similar to the ones that we would accept.

7. Even with an anticipated multiplier of 3.0 for contingent work, my firm is reluctant to accept contingent cases because of the high risk inherent in such cases. We much prefer to work for our regular hourly rates paid on an ongoing basis.

/s/ PAUL E. SLATER
PAUL E. SLATER

SUBSCRIBED and SWORN
to before me this ____ day of
February, 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 79 C 1243 Class Action Honorable John Nordberg
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

AFFIDAVIT OF GARY M. ELDEN

Gary M. Elden, being first duly sworn, states as follows:

1. I am a 1969 graduate of Harvard Law School. I was admitted to practice in the State of Illinois in 1969 and have practiced in Chicago continuously since that time.

2. I am a partner in the law firm of Grippo & Elden. Prior to the formation of Grippo & Elden, I was a partner in the firm of Isham, Lincoln & Beale. Prior to the merger of Isham, Lincoln & Beale and Reuben & Proctor, I was a partner in the firm of Reuben & Proctor and a member of its Executive Committee. Prior to the formation of Reuben & Proctor, I was a partner in the law firm of Kirkland & Ellis. Throughout this time, my individual practice has consisted

almost exclusively of complex civil litigation, predominantly in federal courts. Over the years, I have been involved in more than 30 class actions, both in Chicago and other parts of the country. Most such cases have involved federal securities litigation. In connection therewith, I had considerable contact with most of the plaintiffs' class action bar in this legal community and a substantial number of the principal firms involved in such matters across the country.

3. I am thoroughly familiar with my firm's billing practices (as well as those of Isham, Lincoln & Beale and Reuben & Proctor) and the considerations that attend a decision by our firm to undertake a client's representation. We do not undertake the representation of plaintiffs in any sort of litigation on a purely contingent fee basis. It is our judgment that the potential benefits of such representation are substantially outweighed by its risks and by the delay in payment even in cases where a recovery is ultimately achieved. Accordingly, we only undertake representation of clients where payment is made on an hourly basis.

4. I am aware that there are some attorneys and firms in Chicago and in other areas of the country that will undertake complex civil litigation on a purely contingent basis. Based on my familiarity with such attorneys in this area of the law, it is my understanding and belief that those attorneys will undertake such cases only if they believe that it is realistic to expect that they will receive roughly two to three times their normal hourly rates in the event of success. I am personally familiar with a number of attorneys whose practice has changed considerably in recent years, shifting away from or reducing their involvement in contingent federal class action work because of the uncertainty that fee award decisions in recent years have injected into this area.

5. Based on my personal knowledge as set forth above, it is my firm belief that a person would face substantial difficulty in finding competent representation in the Chicago area to represent him or her in a complex civil litigation matter on a contingent fee basis unless counsel believed he or she had a probability of receiving substantially more than double the regular hourly rates in the event the litigation succeeded.

/s/ GARY M. ELDEN
GARY M. ELDEN

SUBSCRIBED and SWORN
to before me this____day of
February, 1989.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

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Defendants.

No. 79 C 1243
Class Action
Honorable John Nordberg

JOSEPHINE C. NEWTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendants.

No. 80 C 2151

AFFIDAVIT OF GEORGE F. GALLAND, JR.

George F. Galland, Jr. states under oath:

1. I am an attorney licensed to practice law in the State of Illinois. I was admitted to practice in 1973 and have practiced in Chicago since that time. I am a partner in the firm of Davis, Barnhill & Galland, P.C. My practice has concentrated in the area of federal civil rights and other class action litigation. I have personally handled a large number of class action suits under the federal securities law, the federal antitrust laws, Title VII of the Civil Rights Act of 1964, and ERISA. I have not only handled such class actions, but have been called upon in a number of cases to decide on

behalf of my law firm whether my firm would become involved in proposed class actions.

2. My purpose in this affidavit is to describe the considerations that I and my firm take into account in deciding whether to undertake representation of a proposed plaintiff class in complex class action litigation. In addition, I have some familiarity, through my contact with other lawyers in the same field on both sides, with considerations that prevail generally in the legal community in Chicago and elsewhere before lawyers become involved in such actions.

3. In general, I operate under the assumption that a class action of the type typified by the *Skelton* case will be a long and expensive undertaking for my firm. The major class actions that my firm has handled have taken at least four years from filing to conclusion, whether that conclusion was a settlement, a victory in court, or a loss in court. For example, the class action *Mays v. Motorola, Inc.*, No. 75 C 1753 (N.D. Ill.), took six years from filing to final disposition after a successful trial followed by a settlement. *Liberles v. Daniel*, No. 73 C 3217 (N.D. Ill.), a Title VII class action, took ten years from filing till final disposition. The class action *Phemister v. Harcourt Brace Jovanovich, Inc.*, No. 77 C 39 (N.D. Ill.), under the antitrust laws, took six years from filing in 1977 to settlement in 1983. At least ten other class actions handled by this firm took similar amounts of time. These class actions were also expensive. For example, in the class action *McBride v. Burlington Northern, Inc.*, No. 78 C 269; No. MDL 374 (N.D. Ill.), my firm advanced or obligated itself for over one million dollars in costs that it would clearly have been unable to recoup from the named plaintiffs in the event the case had been lost.

4. These cases obviously carry substantial risks of partial or total loss. Aside from a number of cases settled for far less than had originally been hoped for (resulting in little payment to my firm for the work that had been required), at least three of my firm's class actions resulted, after years of

litigation, in a total loss for the class claims: *Coates v. Johnson & Johnson,* 756 F.2d 524 (7th Cir. 1985); *Martino v. McDonald's,* 1985-2 Trade Cas. ¶ 66,885 (N.D. Ill. 1985); and *Washington v. Pierce,* 576 F. Supp. 473 (N.D. Ill. 1983). Of perhaps twenty major federal and state class actions my firm has handled, at least seven of these cases have proceeded to trial and several others were litigated through trial court summary judgment and appeals when defendants refused to settle. My firm's experience has led me to assume at the start of a case that there is a substantial probability that the case may proceed to trial if the class is certified and that it may never settle at all. My experience as a defense lawyer bears that out. Of the three major certified class actions I have defended, my client forced the plaintiff to trial in one of them and has recently settled a second after losing on summary judgment in the trial court and precipitating years of appeals. In short, the idea that class actions are too big to try, or that they all settle, is in my experience untrue.

5. Because of these factors, my firm does not accept the representation of plaintiffs in class action cases unless it believes, at the beginning of the case, that there is a substantial probability of being paid, in the event of success, substantially more than the hourly rate that we bill our paying clients. (In fact, our contingent fee agreement with *individual* clients now includes a "multiplier" provision.) My firm has a substantial amount of such hourly paying business at rates ranging up to $250 per hour billed by senior partners. A decision to take class action plaintiffs' cases entails a decision to give such paying work second priority, and even to turn down such work under certain circumstances. My firm has never accepted a class action on behalf of plaintiffs without operating under the belief that in the event of success it could likely obtain some substantial sort of "multiplier" over the regular rates prevailing in the marketplace in the event of success.

6. Because it follows this policy, my firm, during the period from 1984 through 1987, accepted no new plaintiffs'

antitrust, securities, or Title VII Rule 23 class actions. The uncertainty among the Federal Courts of Appeals and the district courts as to whether a multiplier for risk could be contrast, we continued to accept state court class actions, because the Illinois courts look sympathetically on risk multipliers. We reevaluated this policy in light of the United States Supreme Court's decision in *Delaware Valley II*, which despite the lack of a majority opinion, allows the use of risk multipliers. It appears to us that both the Seventh Circuit and district courts are moving toward a recognition that risk multipliers can be awarded in class actions under fee-shifting statutes. Even so, we have remained cautious about committing major resources to Rule 23 cases, and we have initiated only one new such case, *Meiresonne v. Marriot Corp.*, a Title VII class action. Instead, we have shifted our emphasis to "opt-in" cases under the Age Discrimination In Employment Act, where we can reach individual fee agreements with individual clients that explicitly guarantee us a multiplier in the event that we win.

7. While I cannot speak for all lawyers and law firms, I hold the strong opinion, based on my discussions with my colleagues in this field, that firms capable of litigating complex cases will not invest time and money in this area on a contingent basis without the strong possibility of receiving a multiplier over their regular hourly rates in the event they win. This is particularly true in cases not preceded by government indictments. There is, so far as I can tell, no variation in the major cities of the United States in the attitude of plaintiffs' class action lawyers in this respect. They rightly regard themselves as practitioners in one of the most risky areas of the law, and they will not take cases without the expectation of substantial returns over prevailing non-contingent hourly rates in the event they prevail.

/s/ GEORGE F. GALLAND, JR.
GEORGE F. GALLAND, JR.

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 79 C 1243** **Class Action** **Honorable John Nordberg**
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 80 C 2151**

AFFIDAVIT OF GERALD G. SALTARELLI

Gerald G. Saltarelli, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am a 1973 graduate of the University of Chicago Law School and I have been admitted to the practice of law in this State since 1973. I have practiced continuously in the Chicago legal community since that time.

2. I am a partner in the law firm of Butler, Rubin, Newcomer, Saltarelli & Boyd. My practice consists almost exclusively of complex litigation matters, mostly in federal court.

3. I am familiar with my firm's billing practices and the considerations that go into my firm's decision to undertake

representation of clients. Because of the substantial risk and delay in receipt of payment inherent in undertaking complex civil litigation on a contingent basis, our firm refuses to do so even when the plaintiff's case appears to be solid and potentially worth significant sums. Indeed, even in non-complex litigation, we do not represent clients on a contingent basis. With the exception of one plaintiff in a personal injury case, we have never handled any matter on a contingent basis. In our firm's judgment, the risk and delay in payment of contingent litigation substantially outweigh its benefits as compared to work done on a purely hourly basis. If in the future we were to consider undertaking the representation of a client on a contingent basis, I am confident we would do so only if we felt it were highly likely that, if successful, we would receive compensation substantially in excess of our normal hourly rates; even then, it is extremely unlikely that we would do so.

4. While there are certain attorneys and firms in the Chicago legal community that do undertake class actions and complex civil matters on a purely contingent basis, it is my experience and belief that those attorneys and firms do so only in those situations where they believe that there is a strong probability that, if successful, they will receive compensation substantially in excess of their normal hourly rates.

5. I have reviewed the Court of Appeals decision in this case. It is my belief that a plaintiff would face substantial difficulty in finding competent representation in this legal community for cases such as the case at bar if there were not the likelihood that counsel would receive a substantial enhancement of their normal hourly rates in the event they prevailed in the litigation.

/s/ GERALD G. SALTARELLI
GERALD G. SALTARELLI

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 79 C 1243** **Class Action** **Honorable John Nordberg**
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 80 C 2151**

AFFIDAVIT OF DAVID C. ROSTON

David C. Roston, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I graduated from Harvard Law School in 1967. I have practiced in Chicago for 21 years. I am a partner in the law firm of Altheimer & Gray in Chicago, where I am a litigator.

2. My firm handles a wide variety of litigation, some of which is undertaken on a contingent-fee basis. I am familiar with our firm's policies with respect to the representation of clients on a contingent-fee basis. My firm does not undertake the representation of plaintiffs in contingent-fee

matters of any kind, especially matters as complex as class actions, unless it is our analysis that, if successful, the firm has a reasonable expectation of recovering a fee of at least twice our normal hourly rates for the time expended on the case.

3. My firm is regularly involved in substantial antitrust matters and securities litigation on a class action basis and is also involved in complex civil litigation on an individual basis in a variety of matters, generally falling under the heading of commercial litigation. The contingent fee analysis my firm makes in all of these matters is the same as that described in paragraph 2 above, without regard to the specific subject matter of the litigation.

4. I believe that I am familiar with the factors considered by many Chicago lawyers in determining whether to undertake non-personal injury contingent fee litigation, including class actions. I believe that all of the lawyers with whom I have had contact who would consider undertaking such litigation on a contingent fee basis would do so only on the basis of an analysis similar to the one I described in paragraph 2 above.

5. In my opinion, plaintiffs in a complex civil litigation matter would have substantial difficulty in obtaining qualified counsel in the Chicago legal community on a contingent fee basis if it were not reasonable to expect to receive a fee substantially in excess of (approximately twice) the normal hourly rate for the time expended on the case.

/s/ DAVID C. ROSTON

DAVID C. ROSTON

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 79 C 1243** **Class Action** **Honorable John Nordberg**
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	**No. 80 C 2151**

AFFIDAVIT OF KEVIN M. FORDE

Kevin M. Forde, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am a 1963 graduate of the Loyola University Law School, and have been admitted to the practice of law in Illinois since 1963. I am admitted to practice before the Supreme Court of the United States and the United States Court of Appeals for the Seventh Circuit, District of Columbia Circuit and Federal Circuit. I have tried and/or argued cases before the Northern District of Illinois, Central District of Illinois, Eastern District of Wisconsin, Southern District of New York, Central District of California and Southern District of Florida. I have served as President of the Chicago

Bar Association. Prior to that office I served on its Board of Managers and in the elected offices of Librarian, Treasurer, Second Vice President and First Vice President. I served two terms as Chairman of the CBA Class Action Litigation Committee. I am a member of the ABA and am Chair-Elect in the Rules and Procedure Committee of the Section on Torts and Insurance Practice. I have served as a member of other professional associations, boards and committees.

2. A substantial portion of the practice of my firm, Kevin M. Forde, Ltd., has been in class action litigation. I have written on the subject of class actions (*e.g.*, Forde, *Illinois' New Class Action Statute*, 59 Chi.B.Rec. 120 (1977)) and was the original proponent and principal draftsman of the Illinois Class Action Statute. I have personally handled a large number of class action lawsuits in both federal and state courts. Our firm is often consulted in class action cases and we have represented, as counsel, attorneys petitioning for fees in class action cases. These cases include, *e.g.*, *Sampson v. Eastman Kodak*, 86 CH 650 (Cir. Ct. of Cook County); *A.C.L.U. v. City of Chicago*, 75 C 3295 (N.D. of Ill.); *In re Illinois Congressional Districts Reapportionment Cases*, 81 C 3915 (N.D. of Ill.); *In re General Motors Engine Interchange Litigation*, MDL 308 (N.D. of Ill.).

3. It is the purpose of this affidavit to describe the factors which I and my firm consider in deciding whether to represent a plaintiff in a proposed meritorious class action or other complex litigation. Based on my experience in this legal community, it is my belief that those considerations are substantially similar to those which prevail in this legal community with regard to such matters.

4. It is my experience that an attorney proposing to undertake litigation of this sort must do so with the expectation that the case will take substantially more time and effort than will an even more complicated individual case involving the same legal subject matter. This is true not only because of the briefing and discovery with respect to class certification,

but because of the whole overlay of additional obligations and risks that devolve upon an attorney for the class once a case is certified (including but not limited to class notice procedures, communications with class members, etc.). It is also my experience that class action lawsuits are defended with particular vigor by exceptionally able counsel in part because of the increased liability faced by defendants by virtue of classwide liability. It is my expectation in assessing a meritorious potential class action lawsuit that it will place extremely heavy demands on my firm, and may well take four to six years to resolve.

5. It is my experience that class action litigation not only places onerous time demands on the attorney for the class, but also substantial financial demands, including out-of-pocket expenses which may be substantial.

6. The most imposing financial demand that the undertaking of class action representation places on the lawyer is that he or she is required to devote a substantial amount of time (and, during certain periods of the litigation, virtually *all* of his or her time) to a case which yields no current income, even though the attorney's expenses must be paid on a current basis. Rent, secretarial and support staff, non-equity attorneys in the firm, library upkeep, professional liability insurance, etc. must all be paid by the firm on a regular basis without regard to income received by the firm. Hence, once a commitment is made to undertake such litigation, it necessarily limits the ability of the firm to undertake *other* cases which would provide income to the firm on a current basis.

7. As a consequence of the factors outlined above, it is my experience that many attorneys and firms which undertake substantial class action representation maintain lines of credit with banking institutions so that the firms can continue to operate and meet their bills during the sometimes-extended periods of time during which there is no income resulting from class action litigation undertaken on a contingent basis.

8. In my experience, class actions are no more likely to result in recovery than are individual lawsuits. It is my experience that a substantial percentage of class action lawsuits are lost.

9. In my experience, it is almost never the case that the plaintiffs in a proposed class action can retain counsel on anything other than a contingent basis. Accordingly, when deciding whether to undertake the representation of a plaintiff in a proposed class action, in my experience counsel must make that decision on the assumption: (a) that the representation will require a tremendous investment of the attorney's or firm's time and money; (b) that there is a substantial risk that after such an investment of time the attorney will receive nothing; and (c) that if there is a recovery, it will probably not come for a number of years. Because of these factors, we generally do not undertake such representation unless we believe that there is a substantial probability that, if the suit is successful, our firm will receive substantially more than our usual hourly rate for time devoted to the litigation. By "substantially more than our usual hourly rate," we mean at least double that rate; otherwise the risk is too great, considering the costs of maintaining a law office. This same analysis prevails throughout the Chicago legal community.

10. Based on my experience in and familiarity with the Chicago legal community, it is my belief that a person seeking representation in a complex civil matter in this community faces very substantial difficulties in finding counsel to undertake such representation on a contingent fee basis without the possibility of receiving a substantial enhancement over normal hourly rates in the event of success.

/s/ KEVIN M. FORDE
KEVIN M. FORDE

SUBSCRIBED and SWORN
to before me this 14th day of
February , 1989.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 79 C 1243 Class Action Honorable John Nordberg
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

AFFIDAVIT OF ROBERT L. GRAHAM

Robert L. Graham, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Illinois. I am a 1972 graduate of Harvard Law School and I have been admitted to the practice of law in this State since 1972. I have practiced continuously in the Chicago legal community since that time. In addition to other bar activities, I have served as the President of the Chicago Council Of Lawyers, Chairman of the Fund For Justice and a member of the Illinois Supreme Court Committee On Pattern Jury Instructions In Civil Cases.

2. I am a partner in the law firm of Jenner & Block. My practice consists almost exclusively of litigation matters,

mostly in federal court. I have litigated a large number of class action lawsuits and feel that I am quite familiar with the litigation bar in this legal community.

3. I am familiar with my firm's billing practices and the considerations that go into our firm's decision to undertake representation of clients. Except for cases taken on a *pro bono* basis, our firm does not undertake the representation of plaintiffs in any sort of litigation on a purely contingent basis. Indeed, it is my belief that in only one instance has our firm undertaken the representation of a plaintiff on a partially contingent basis, in which case our firm had the firm belief that, if successful, we would receive substantially more than our normal hourly rates for all time devoted to that case.

4. Because of the substantial risk and delay in receipt of payment involved in undertaking complex civil litigation on a contingent fee basis, our firm does not undertake such matters on that basis. While there are certain attorneys and firms in the Chicago legal community that do undertake class actions and complex civil matters on a purely contingent basis, it is my experience and belief that those attorneys and firms do so only in those situations where they believe that there is a strong probability that they will receive compensation substantially in excess of their normal hourly rates if they prevail. Based on my conversations with various members of the Chicago Bar over the years, the standard that seems to be applied by those firms undertaking substantial litigation on a purely contingent basis is whether there is a reasonable probability of receiving two to three times the attorneys' hourly rates if a recovery is made.

5. It is my belief that a plaintiff would face substantial difficulty in finding competent representation in this legal community for complex civil cases if there were not the likelihood that counsel would receive a substantial enhancement of their normal hourly rates (as discussed in the preceding paragraph) in the event they prevailed in the litigation.

/s/ ROBERT L. GRAHAM
ROBERT L. GRAHAM

SUBSCRIBED and SWORN
to before me this 14th day of
February, 1989.

Notary Public

My commission expires: 2/16/89

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE GENERAL MOTORS CORP. "THM 200" TRANSMISSION LITIGATION

ARLIE GLEN SKELTON, *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs,* *v.* GENERAL MOTORS CORPORATION, *Defendant.*	No. 79 C 1243 CLASS ACTION JUDGE JOHN NORDBERG
JOSEPHINE C. NEWTON, *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs,* *v.* GENERAL MOTORS CORPORATION, *Defendant.*	No. 80 C 2151 AND ALL CONSOLIDATED ACTIONS

ORDER[1]

Pursuant to prior Orders and rulings of the Court, the escrow agent is ordered to make payment to the following law firms the amounts of additional fees and interest indicated below. Payment is to be made to each firm on May 25, 1989, provided that by that date that firm has filed with the Court

the undertaking as indicated during the hearing on May 5, 1989. The Court finds that without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market.

Law Firm	Additional Fees And Interest Awarded 4/25/89	Interest From 4/25/89 to 5/25/89 (at prime rate, 11.5%)	Total
Charles A. Boyle & Assoc. ..	$ 189,346.00	$ 1,516.00	$ 190,862
Corinblit and Seltzer.....	8,914.00	71.00	8,985
Abraham N. Goldman & Assoc.	190,860.00	1,528.00	192,388
Goodkind, Wechsler, Labaton & Rudoff.....	102,633.00	822.00	103,455
Frances E. Goodman	26,099.00	209.00	26,308
William J. Harte.....	109,503.00	877.00	110,380
Beverly C. Moore	219,841.00	1,761.00	221,602
Sachnoff, Weaver & Rubenstein.....	553,866.00	4,435.00	558,301
Zwerling, Schachter & Zwerling.....	7,618.00	61.00	7,679
TOTALS	$1,408,680.00	$11,280.00	$1,419,960

Dated: May 23, 1989

/s/ JOHN A. NORDBERG

JOHN A. NORDBERG
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs, No. 79 C 1243

vs.

GENERAL MOTORS CORPORATION,
Defendant.

No. 79 C 1243
Chicago, Illinois
April 11, 1989
4:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. NORDBERG

APPEARANCES:

For the Plaintiffs:	MR. ABRAHAM N. GOLDMAN MR. LOWELL E. SACHNOFF
For the Defendant:	MR. JAMES ANDREW LANGAN MR. WILLIAM R. JENTES
ALSO PRESENT:	DR. RICHARD E. HOYT

MICHAEL P. SNYDER, RPR, CSR
Office Reporter
United States District Court
19 South Dearborn Street, Room 2128
Chicago, Illinois 60604
Telephone (312) 435-5563

MR. SACHNOFF: If Your Honor would grant a multiple that was sufficiently high to upset the folks at General Motors, then obviously they then—they couldn't appeal that, but they could take cert from that ruling, they could attempt

to apply for certiorari from that ruling, because both sides have agreed not to appeal from the size of the multiple that Your Honor grants.

Am I stating that right, Mr. Jentes? I think I am.

MR. JENTES: You are. I have that here.

MR. SACHNOFF: Good.

So Your Honor has the power to at least stop it in this court, stop it in the Court of Appeals, and then the only thing that could block a distribution would be the extraordinarily remote circumstance of the Supreme Court taking cert in a common fund case like this.

Your Honor, there has been no stay of the mandate. We would ask to have the distribution go ahead, and if they are really serious in this frolic, they ought to ask for a stay in the Supreme Court. Now, they could ask—

THE COURT: That is true. If there is no stay, we could order the final distribution.

MR. SACHNOFF: Sure, we could go ahead with the final distribution.

THE COURT: Well, all right. I want to hear from General Motors now, but let me just make two observations.

Obviously, in a sense, while I don't mean to indicate that anyone involved in this case has a wrongful attitude, the Court in a sense is now in a position of representing the class in a sense because General Motors has agreed to pay out and will pay out the full amount, and you have the conflict of interest on the question of attorneys' fees. That plus the surprise, because I think the record is clear, I feel surprised at the amount of the cost of the Analytics operation. I just—I had no idea we were running that far over, and I didn't—perhaps I should have anticipated it, but I didn't realize the amount of the cost per month where no, in effect, questions

now are being taken, and we are merely waiting for a final distribution.

So those are concerns that compelled me to ask all counsel to meet to see if there wasn't some way we could just settle the whole thing out and make a final distribution now so that we would maximize to that extent the ultimate distribution to each of the members of the class as well as whatever goodwill falls to General Motors and in effect be as efficient as possible in this by working out now an overall settlement where no further delay would be required by reason of any further court action.

Now, as I understand it, there is no delay if I find there should be a multiplier, there could continue to be a delay if I find that there should be no multiplier, and because there has been no supersedeas bond, in effect, filed, there is no stay from the seeking of cert with the United States Supreme Court.

With that, I would like to call on General Motors and Mr. Jentes to see what General Motors' position is on this.

MR. JENTES: All right. Let me say by way of background on the question of the cert. As Your Honor may or may not know, one of my partners happens to be Justice White's son, and the Justice for a long time has taken the position that he recuses himself in cases involving our firm.

Also, as you probably know, Justice White has been the author of most of these opinions relating to attorneys fees questions including the most recent, the Blanchard versus Bergeron case, and General Motors felt, and I think they are correct in their judgment, that they didn't want to have Justice White not have an opportunity to review the matter on the cert petition.

Therefore, they have decided to retain Mr. Shapiro, formerly with the Solicitor General's office, at Mayer, Brown to handle the cert petition. He has now gotten himself up to

speed. He intends to file the cert petition on the 13th of this month, and I am sure will press it very strenuously.

One possibility, Your Honor, would be on the normal schedule in the cert petition, that cert petition then would be responded to I am sure promptly by counsel for the other side, and the clear expectation would be that the Court would rule on any cert petition before it adjourned for the summer.

MICHAEL P. SNYDER, Official Reporter

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-7763

MATTIE NORMAN, *et al.*,
Plaintiffs—Appellants

v.

THE HOUSING AUTHORITY OF THE CITY OF MONTGOMERY, *et al.*,
Defendants—Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR PLAINTIFFS—APPELLANTS

VANZETTA PENN MCPHERSON
639 Martha Street
Montgomery, Alabama 36104
(205) 262-7337

Counsel for Plaintiffs—Appellants

B. THE ATTORNEY FEES SHOULD HAVE BEEN ENHANCED.

The United States Supreme Court has recognized that enhancement of a fee award is entirely permissible in certain cases. *See Blum v. Stenson, supra, Hensley v. Eckerhart, supra.* Factors which traditionally have been considered to support enhancement of the Appellants' fee award.

First, it is beyond dispute that recovery of fees in civil rights cases is contingent upon the plaintiffs prevailing in the litigation. The legislative history accompanying the civil rights fee award statute (42 U.S.C. Section 1988) specifically refers to *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), as providing "the appropriate standards to be applied by courts awarding attorney's fees under Section 1988." *Blum v. Stenson*, 104 S.Ct. at 1551 (Brennan & Marshall, J.J., Concurring Opinion).

"Whether the fee is fixed or contingent is one of twelve enumerated *Johnson v. Georgia Highway Express* factors and "was consequently recognized by Congress as a relevant consideration in setting a reasonable fee." *Blum v. Stenson, supra* at 1551. Accordingly, the Appellants' fee in the present case should be enhanced—either by increasing the hourly rate requested or by otherwise enhancing the fee—to "reflect the risk of not prevailing."

A portion of the Appellee's counterargument below should be struck down by this Court. They presume—and the affidavits which they submitted presume—that civil rights cases are not as intellectually taxing as "securities, antitrust, or other such complex litigation". RT-57. This presumption is not uncommon, but the policy underlying 42 U.S.C. Section 1988 and the legion of cases in this Circuit which have unequivocally endorsed the soundness of that policy compel

a specific judicial denunciation of the notion that civil rights cases are not complex.[1]

Although the "quality of representation" is generally reflected in the appropriate hourly rate, it may justify an upward adjustment where the fee applicant offers "evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged" and that the success was "exceptional" *Blum v. Stenson*, 104 S.Ct. at 1549.

Appellants have demonstrated that they have handled an exceptionally complex case in an exceptionally expedient manner. While that fact is to some extent reflected in the appropriate hourly rate to be awarded Appellants' counsel, the fact that Appellants' counsel expended approximately ⅓ of the time litigating a case which involved a class approximately three times as large as that involved in *Nelson, supra,* warrants an enhancement in recognition of skill.

In addition, the anticipated monetary recovery to the class in the instant case is approximately double that which is anticipated in *Nelson*, even though the instant case was settled prior to actual trial.[2] Thus, the quality of services rendered in the present case was "superior" and the success achieved "exceptional." For this reason as well, Appellants' fee request should be enhanced.

Finally, although the "results obtained" will generally be "subsumed within other factors used to calculate a reasonable fee," and will not *normally* provide an independent basis for enhancing a fee award, see *Blum v. Stenson,* 104 S.Ct. 1549,

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[1] This notion is but an extension of the stigma attached to the status of "civil rights lawyer". It's perpetuation in the bar is the likely seed of the *Johnson* requirement that the court consider the undesirability of a case or its adherents.

[2] The same court awarded fees of $100 per hour to far less experienced Legal Services counsel in a class action which settled prior to trial. See McClain v. City of Enterprise, No. 85-T-1288-S (M.D.Ala Oct. 15, 1986).

it may be considered in "cases of exceptional success." *Blum, supra,* at 1550. In the instant case, the Montgomery Housing Authority has publicly stated that the anticipated recovery to the plaintiff class (electric utilities only) will be about $700,000.00. Based on information provided by the Housing Authority and by the Alabama Power Company, the ultimate recovery could actually be as high as $1,000,000. In addition, Appellees have stated that subsequent to the filing of the present case they suspended collection of excess gas charges from tenants at the Housing Authority (plaintiff class members) for a period of approximately [2½ years], and that the benefit to the plaintiff class (gas utility allowances) would probably approximate the recovery on the electric utility allowances. In addition, the Defendants have agreed to charge reduced gas utility allowances for an additional twenty-one months following entry of the Consent Order and Judgment.

Thus, a conservative estimate of the total benefit achieved for plaintiff class members is between 1.5 and 2 million dollars. Obviously, the results obtained were "exceptional"; and enhancement of Plaintiffs' fee award is entirely justified on that basis as well. (A modest contingent fee award of only 30% would equate a $400,000—600,000 fee award in the instant case).

C. There Have Been Comparable Fee Awards In Similar Cases

A predominant factor to be considered in setting fee awards under *Johnson v. Georgia Highway Express* is "awards in similar cases." 488 F.2d at 719. One of the contemporaneous fee awards in similar cases is that awarded in *Nelson v. Greater Gadsden Housing Authority, supra.* There, two legal services attorneys and an associated private attorney spent approximately 1,200 hours litigating a case comparable to the instant case, but involving approximately ⅓ the number of public housing units. The fee award in the case was enhanced by a factor of 1.5. In addition, the Court awarded

$3,101.40 as reasonable fees and expenses incurred in the representation of counsel for the plaintiff class at the hearing on attorney's fees. The total fee awarded was $209,518.45.

There have been several other cases in the Middle District of Alabama in which the lodestar calculation yielded a much higher hourly rate and in which the court's consideration of the *Johnson* factors enhanced the fee under circumstances similar to those that obtain here. That court has awarded fees in the range of $100 per hour in the following civil rights cases: *York v. Alabama State Bd. of Education, supra; Birl v. Wallis.* No. 83-T-809-N (M.D. Ala. July 24, 1986); *Zakrzewski v. Alabama State Council,* No. 85-T-512-N (M.D. Ala. April 28, 1986); and *McClain v. Alabama State Council,* No. 85-T-512-N (M.D. Ala.)

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

No. 79 C 1243
Chicago, Illinois
April 25, 1989
3:30 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. NORDBERG

APPEARANCES:

For the Plaintiffs: MR. ABRAHAM N. GOLDMAN
MR. LOWELL E. SACHNOFF

For the Defendant: MR. JAMES ANDREW LANGAN
MR. WILLIAM R. JENTES
MS. ANN M. HAMILTON

MR. SACHNOFF: I can say for the record now that there was a great deal of skepticism as to whether it was a wise thing to do, because they thought there would be an affirmance that would be carved in stone up in the Seventh Circuit. Our fees are, I feel, what fees ought to be on appeal.

I want to state for the record that I am going to consult with my colleagues upon whom I have really bestowed a gift here, and I will see whether or not I can persuade them in the interest of full justice to compensate us for the costs and the fees that we incurred in connection with the appeal. I

hope they will do that, but I am not certain, and if they don't, I will supply the Court with authorities that support the proposition that class counsel are entitled to payment of fees in a case such as this where it is necessary to take an appeal.

Those are the only two issues, Your Honor, that come to mind.

THE COURT: All right, but that wouldn't delay the final distribution.

MR. SACHNOFF: No, not at all.

THE COURT: Mr. Jentes.

MR. JENTES: We are obviously disappointed in Your Honor's ruling. I think it is an unfortunate precedent, but I am not going to reargue the issue.

THE COURT: Well, it is not going to be published, and, as far as I am concerned, it ends with this case. This is a unique case.

MR. JENTES: I would certainly welcome Mr. Sachnoff's offer to provide some kind of a letter of credit or bond or whatever on behalf of the plaintiffs' counsel so that if the Supreme Court takes this matter on cert and reverses the Seventh Circuit, as I would hope and indeed somewhat expect them to do, that we would be able to figure out a way to insure that the attorneys fees that are now being withheld would ultimately get to the class. So if that can be worked out mechanically, we would welcome that.

Secondly, with regard to the matter of any further application for fees, I can only say we will respond to that whenever that is put forward.

Finally, I think that the procedural status of the case now in terms of further appeals and in terms of the certiorari is something that we will have to consult with the Mayer, Brown firm on, and I just don't know now whether we may have any other suggestions as to how the actual ordering here should be done so that we are preserving adequately the record so that it can be considered by the Supreme Court. So I will have to get back to Your Honor, if I may, if we have any suggestions on that.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

Civil Action
No. 79 C 1243

JOSEPHINE C. NEWTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
Defendant.

No. 80 C 2151

And Related.

Before the HON. JOHN A. NORDBERG, Judge, on Tuesday, July 8, 1986, at the hour of 10:15 o'clock, a.m.

PRESENT:

MR. SACHNOFF,
MR. BOYLE,
MR. HARTE,
MR. MOORE,
MR. PLASSE,
MR. JENTES,
MR. JOHNSON
(And other parties not identifying themselves for the record.)

MR. JENTES: I think that that language is eminently applicable to the settlement that has been reached here, and, on that basis, I hope that your Honor will preliminarily approve the materials that have been submitted.

In that connection, Mr. Sachnoff handed to you the order for consolidation and the redefinition of the class, et cetera.

There is a second order that also has some changes in it, necessitated by the fact that we do not have the Atard and Morgan cases here.

I gather, Mr. Sachnoff, that you've just handed that to the —

MR. SACHNOFF: I have.

THE COURT: Okay.

MR. JENTES: All right. Fine.

Those two orders, as modified, your Honor, I think are in an appropriate form now for entry by your Honor. I think there are a couple of dates that need to be filled in on the forms—

THE COURT: Well, all right, but before we get to that let me just indicate, and I was planning to cover that language but— and that's in Section 30.44 of the Manual for Complex Litigation Second, and I do think that that sums up what the Court should consider at this hearing, which is a first stage of the ultimate Fairness Hearing that would be required to settle this case.

It seems to me that the other thing that has not really been fully covered by all of the parties orally, although it has been alluded to in the written material, and certainly anybody who has worked on this case is familiar with all of the problems that are involved in this litigation, and without taking sides substantively in any way, I think that it is clear over the course of this litigation and is indicated in other similar type of litigation, the severe strains and the great

uncertainty that results from the sheer numbers and the sheer complexity of fact finding that could be required in a case of this nature.

Now, I know that plaintiffs have a statistical theory that they feel could have supported the case but—and that may ultimately have proven to be correct, but I don't think anybody can look at this entire case without realizing that it not only would be extremely expensive to try; there would be an extremely expensive appeal that would be taken, but also there would be a great deal of uncertainty and I think an extremely long period of time before this matter was finally resolved, and I think that all of these are factors also that have to be considered in determining whether this is a fair and proper settlement of this action.

Now, the request for the modification of the class is a matter that I have also carefully considered and the settlement class, the revised class, in a way, is broader than what was certified; broader, perhaps, than what the law would require, but, in a way, it is narrower, too, and I have considered that as well.

In any event, one final thing, which is not really as easy for counsel to say themselves as it is for me to say because it is the truth, the Court has been blessed throughout this case with the fact that we have outstanding lawyers representing the respective interests involved here and they have worked very conscientiously on their respective clients' behalf and that has been a real help to the Court and that certainly is a factor that the Court can also take into account in determining whether, ultimately, the settlement reached is a proper and fair one.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ARLIE GLEN SKELTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	Civil Action No. 79 C 1243
JOSEPHINE C. NEWTON, *et al.*, *Plaintiffs,* v. GENERAL MOTORS CORPORATION, *Defendants.*	No. 80 C 2151

And Related.

Before the HON. JOHN A. NORDBERG, Judge, on Thursday, October 30, 1986, at the hour of 2:30 o'clock, p.m.

PRESENT:

MR. SACHNOFF,
MR. BOYLE,
MR. SCHUMACHER,
MR. MOORE,
MR. SCHACHTER,
MR. HARTE,
MR. GOLDMAN,

MR. SUCHAROW
on behalf of respective plaintiffs;
MR. JENTES,
MR. JOHNSON,
MR. LANGAN,
MR. LINDEMAN,
on behalf of defendant.

THE COURT: Now, I think that I did cover—we did deal with the question about the loss of trade-in value, as to which there would be, and I think the expression was "the insurmountable problems of proof," and I don't know that anything is "insurmountable" but it would be extremely difficult and I'm not sure, in the long run, what that would do to the ability of there to be an ultimately successful judgment on behalf of any of the plaintiffs. But, in any event, I do believe that there has been an adequate explanation for the reason that one—one of the reasons, anyway—why it was not attempted to be included and— well, I think it probably was attempted to be included but the reason it was not included in the settlement agreement is that it is a settlement agreement; it was negotiated. Certain matters could be included, ultimately, by agreement; other matters could not. That was a matter that was not included and I don't find that that makes the settlement agreement unfair.

I might just say that there is difficulty of proof in this case. I know how strongly the plaintiffs feel about the case, and I know how strongly General Motors feels to the contrary that it should not be found liable on this situation, and I don't say that either side is not acting in complete good faith in having that difference in views.

One of the reasons for it is, and I won't go into the details of it but, unfortunately, no company on earth can make perfect products, particularly when you get into more complex areas such as are involved in making automobiles; there is

always a certain number of failures that will occur in mass production, and so, too, is this true of transmissions.

So, the real issue in the case is whether the failure rate of the THM-200 transmission is high enough to indicate that there is should be liability on the part of General Motors. That's an oversimplification of the issues but having some knowledge now of the general areas in which the proof would come in, I can speak, I think, with some authority to indicate that this would be a difficult case for plaintiffs to try and it would be difficult to have great assurance as to what the ultimate verdict of a jury might be in this case.

So, taking, then, all of these various matters into account, the Court does find, pursuant to Rule 23(e), now, that the proposed settlement of this case and the settlement agreement that is involved, is fair, reasonable and adequate, and the Court so finds, and, therefore, the Court does approve the proposed order that has previously been presented to the Court, and I have now a revised version of that, a portion of the order being—well, I will read the first portion of the order just so that those of you who are present will have a sense of it. It is a long order and I won't read the whole thing but, certainly, copies will be made available to anybody who wishes to have a copy of that order.

Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1848

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 974-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Statute:

Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301 *et seq.* 1, 6
§ 2310(d)(2) 5

REPLY BRIEF FOR THE PETITIONER

The plaintiff class in this case was represented by some 30 lawyers from nine different law firms in New York, Chicago, Los Angeles, and Washington, D.C. See Pet. App. 66a-67a. The district court initially determined that the lodestar award of $2 million—based on a maximum approved rate of $240 per hour (*ibid.*)—constituted a reasonable attorneys' fee and that a risk multiplier was "neither necessary nor appropriate" (*id.* at 64a). The court of appeals reversed, holding that a multiplier could be awarded whenever a class action brought under a fee-shifting statute results in a monetary settlement. Pursuant to that ruling, the district court granted a multiplier of 1.6, effectively enhancing the maximum hourly rate to $385. Thus, as a result of the decision below, counsel will receive a bonus of $1.2 million that otherwise would have gone to their clients.

As discussed in our petition, the court of appeals' decision authorizing attorneys' fee multipliers despite this Court's decision in *Delaware Valley II* raises a frequently recurring question of substantial public importance. The significance of this multiplier issue is underscored by the *amicus curiae* briefs that have been filed in support of the petition on behalf of both state and local governments and a broad spectrum of the business community. Nowhere have respondents disputed the general importance of the question presented or the adverse practical consequences of the decision below for the legal system.

Our petition and the *amicus* briefs also demonstrate that the court of appeals' ruling is flatly inconsistent with the Magnuson-Moss Act and *Delaware Valley II*. Respondents do not attempt to show how the court of appeals' approach to multipliers can be squared with the principles adopted by Congress and this Court. Instead, they assert that those principles are simply irrelevant here because of the existence of a settlement fund. In

addition, they seek to immunize the court of appeals' ruling from further review by contending that GM lacks standing to file a petition for certiorari and that the multiplier may be upheld on an alternative theory that was not the basis for the decision actually rendered. None of these arguments militates against the need for this Court's review.

I. GM HAS STANDING TO SEEK CERTIORARI

Respondents concede that they and their clients "have adverse interests in allocating the [settlement] fund" and that the multiplier awarded to respondents "reduc[es] the recovery of the plaintiffs whom they represented" (Br. in Opp. 11). Nevertheless, respondents unabashedly contend that GM—which alone has the incentive to protect the interests of the class on the fee issue—has no standing to seek review of respondents' legal entitlement to an enhanced fee.

Respondents completely overlook the fact that GM has a continuing economic interest in the allocation of the settlement fund. The reverter clause in the settlement agreement (¶ 25) provides that "[a]ny portion of the Settlement Fund or accrued interest remaining after the distributions [to the class and counsel] shall revert to General Motors." Under this express provision, GM has a right to any money in the settlement fund that is not paid out. If the attorneys' fee multiplier is set aside, an additional $1.2 million will be available to the class members. As is ordinarily the case, a portion of that amount will not in fact be distributed to the class—and hence will revert to GM—due to factors such as undeliverable checks (*e.g.*, changes in residence with no forwarding address), and lost and uncashed checks. Thus, GM has "an interest, arising from its colorable claim for the return of excess money, in whether attorney's fees could be [enhanced]" (*Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 481 n.7 (1980)), and this is sufficient to confer standing. Indeed, GM's interest under the reverter clause

is the same interest that it had in the district court, which respondents concede gave GM standing (see Br. in Opp. 5).

GM also retains an additional interest in the proper distribution of the money it paid to satisfy plaintiffs' claims under the settlement agreement. As explained in the petition (at 20-21; see also Nat'l Ass'n of Counties Am. Br. 3, 9-10; PLAC Am. Br. iv, 5), GM has a direct economic stake in promoting customer goodwill by ensuring that the maximum amount of the settlement fund is disbursed to the class members—its past and prospective customers—rather than to respondent law firms. Indeed, GM's interest in opposing an enhanced fee was recognized in the settlement agreement, which specifically preserved GM's right to challenge any multiplier.

In cases such as this one, a settlement does not simply end the litigation and limit the defendant's liability; it also is designed to re-establish amicable relations between the defendant and its customers. Here, the class claimants—consisting of more than 64,000 purchasers of GM automobiles—constitute a large and important group of potential future customers for GM products. Under the ruling below, however, $1.2 million of GM's settlement payment will be used to give a windfall to counsel rather than to defray the repair expenses incurred by the class members and thereby restore customer goodwill. If the enhanced attorneys' fee had exhausted the entire settlement fund, the interference with GM's legitimate business interest would be clear; GM's interest in the present case is no different in principle.

Allowing the settling defendant to be heard on the issue of an attorneys' fee multiplier provides a vital safeguard for the interests of absent class members. In this case, for example, the interests of GM and the class coalesced once the settlement was reached: both sought to ensure that plaintiffs would receive the maximum benefit of the settlement. At the same time, as respond-

ents concede, a conflict arose between class counsel and their clients over the distribution of the settlement fund. Thus, counsel could not represent the class members on the multiplier issue, and GM in essence stepped in to protect the interests of the class (which were common with its own). In analogous areas of the law, third parties—including former adversaries in litigation—have been permitted to challenge attorneys' fee awards in order to protect the interests of claimants that otherwise could not practicably be asserted. See, *e.g.*, *Allen* v. *United States*, 606 F.2d 432, 434 (4th Cir. 1979) (in veterans' benefit case, "the government has standing [to contest a fee award] even though the fees are not assessed against the United States * * * [because it] has an interest in seeing that funds it owes to litigants are disbursed properly"). The district court repeatedly recognized that GM was serving as the guardian of the class's interest, commending it for acting "on behalf of the class" (11/30/88 Tr. 27) and for providing "great help to the class" (4/25/89 Tr. 5) in view of the fact that "plaintiffs' counsel * * * have their own self interests" (3/29/89 Tr. 5).

Respondents argue (Br. in Opp. 6), however, that it is the district court that should protect the interests of the class members. While the court must ensure that the amount of the fee it awards is reasonable, it cannot act as the class's advocate on the question whether a multiplier is authorized by law. Furthermore, even if the district court could adequately protect the class at the trial level, it could not perform the same function in the court of appeals or in this Court, *e.g.*, by filing the petition for certiorari.

Respondents also note (Br. in Opp. 6) that no member of the class intervened to contest the fee award (although several did write to protest counsel's exorbitant fee request). The suggestion that respondents' claim to a multiplier must go unopposed unless individual class members—each of whom has only a small economic stake

—come forward and "obtain[] additional counsel with which to litigate this issue" (*ibid.*) is completely unrealistic and inconsistent with the underlying theory of class actions. See, *e.g.*, *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326, 338 (1980).

II. THE COURT OF APPEALS' DECISION IS PLAINLY ERRONEOUS

Little need be added to the petition to show the serious error in the court of appeals' decision. Congress has determined that a reasonable attorneys' fee shall be "based on actual time expended" (15 U.S.C. § 2310(d)(2))—a standard that squarely forecloses a multiplier that *exceeds* the lodestar computed from time expended and hourly rates. Moreover, the concerns underlying *Delaware Valley II*—in particular, the windfall produced by a multiplier that duplicates factors already reflected in the lodestar, the perverse incentives that a risk multiplier creates to bring marginal litigation, and the undesirability of spawning extensive litigation over the issue of attorneys' fees—are equally telling here. See *Missouri* v. *Jenkins*, No. 88-64 (June 19, 1989), slip op. 7-8 (*Delaware Valley II* "rejected an argument that a prevailing party was entitled to a fee augmentation to compensate for the risk of nonpayment").

Of even greater importance, respondents completely ignore the intolerable conflict of interest that is engendered by the court of appeals' decision. Under the decision below, counsel will be encouraged to settle litigation in order to be eligible for a multiplier regardless of the best interests of their clients. See *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2256 (1989) (rejecting the construction of an attorneys' fee statute that created an "incentive" that "runs directly counter to long established ethical canons of the legal profession").

Despite the fact that both Congress and this Court have defined a reasonable attorneys' fee in terms of the lodestar amount, respondents offer two theories to justify

the award of a risk-enhanced fee over and above the reasonable lodestar fee. Neither has any merit.

First, respondents repeatedly assert that this is a "common fund" case that is governed by "equitable" principles rather than a statutory "fee shifting" case. But respondents' rote incantation of the phrase "common fund" does not provide any reason why a different set of rules should apply to a case litigated under a fee-shifting statute simply because a monetary settlement was reached. Indeed, because "equity follows the law" (Nat'l Ass'n of Counties Am. Br. 11), the standards of the Magnuson-Moss Act and *Delaware Valley II* would be controlling here even if equitable principles were relevant. Respondents utterly fail to explain how it could be "equitable" to award a lavish fee that Congress and this Court have declared to be unreasonable.

Second, respondents attempt to distinguish *Delaware Valley II* on the ground that the risk-enhanced fee in this case would be paid by the class members out of the settlement fund rather than directly by the defendant. Even assuming that the multiplier is not indirectly shifted to the defendant through the settlement—a proposition the *amici* refute (see Nat'l Ass'n of Counties Am. Br. 2, 8-9; PLAC Am. Br. iii, 4)—respondents' proffered distinction does not render *Delaware Valley II* inapplicable. Respondents treat this consideration as if it were the sole basis for the Court's decision, but of course multipliers were harshly criticized for a number of other reasons (see page 5, *supra*)—none of which respondents discuss, and all of which apply fully to the multiplier in this case.

Furthermore, windfall multipliers do not become any more "equitable" simply because they are taken out of the plaintiffs' pocket instead of the defendant's. On the contrary, there is even less justification to impose the economic burden of the multiplier on the innocent class members who are not only the intended beneficiaries of the federal statute but also the clients of the lawyer seeking the increased fee. Under *Delaware Valley II*,

plaintiffs who successfully settle a case cannot fairly be required to pay a multiplier to their counsel for the lawyers' losses in other litigation.

The court of appeals' sweeping "common fund" theory holds enormous practical consequences for the litigation system. In class actions that are brought pursuant to a fee-shifting statute and result in monetary relief, counsel would be allowed to seek a multiplier notwithstanding the statute and *Delaware Valley II*, and the amount of the multiplier awarded as a matter of "equity" would not be limited to—and could greatly exceed—the reasonable attorneys' fee that would be available under fee-shifting principles. See Br. in Opp. 10. Thus, if *Delaware Valley II* had been a class action involving a monetary fund, counsel would have been entitled to a multiplier for any litigation risks in that case despite this Court's holding that a multiplier was impermissible under the statute. Such a rule is a frontal assault on this Court's decision and represents an open invitation for over-reaching lawyers to enrich themselves at the expense of their clients.

Respondents nonetheless complain that the absence of multipliers will "discourage * * * consumer litigation" (Br. in Opp. 12) and will fail to provide fee awards "analogous to the fees paid to lawyers in common law tort contingency fee cases" (*id.* at 11). The short answer is that Congress and this Court have determined that attorneys' fee awards should be limited to a "reasonable" fee, which generally does not include a risk multiplier; *Delaware Valley II* considered and rejected the contention that multipliers are necessary to encourage meritorious lawsuits, and respondents' assertion is no more availing here. Furthermore, the Court consistently has held that attorneys' fees awarded by courts "should [not] be modeled upon the contingent fee arrangements used in personal injury litigation." *Blanchard* v. *Bergeron*, 109 S. Ct. 939, 945 (1989); see also Pet. 11 & n.3. Litigants can, of course, agree by private contract to pay their lawyers a large contingent fee that embodies a sub-

stantial risk bonus, but a court has no authority to grant anything other than a "reasonable" fee, which precludes a risk-enhanced award.

Finally, respondents cite (Br. in Opp. 13-14) several "common fund" cases in which multipliers have been granted. Significantly, however, all of those decisions preceded *Delaware Valley II*. It is hardly surprising that multipliers were prevalent prior to this Court's decision sharply curtailing enhanced fees—indeed, courts at that time routinely awarded multipliers even under fee-shifting statutes—but that sheds no light on the central question here: whether multipliers in class actions brought under a fee-shifting statute and resulting in a monetary settlement are exempt from the rules announced in *Delaware Valley II*. Respondents' brief in opposition does not advance any persuasive reason to conclude that they are.

III. RESPONDENTS' ALTERNATIVE MULTIPLIER THEORY DOES NOT PRECLUDE THIS COURT'S REVIEW OF THE COURT OF APPEALS' DECISION

Respondents seek to divert the Court's attention from the question presented in the petition by advancing an alternative theory—entirely unrelated to the holding of the court of appeals—to defend the fee multiplier. On remand from the court of appeals, the district court, weeks after selecting a multiplier of 1.6, stated in a supplemental order that "without an adjustment for risk the plaintiffs would have faced substantial difficulties in finding counsel in this market" (Br. in Opp. App. 29a). This statement was requested by respondents—after the petition for certiorari had been filed—purportedly to "tie up * * * a loose end" on "a small point" (5/23/89 Tr. 10) that would become relevant in the event "that the cert petition is granted * * * [and the case is] sent back all the way down a year or two later" (*id.* at 8). Respondents now contend, however—relying on the exception suggested in Justice O'Connor's concurring opinion in *Dela-*

ware Valley II that a multiplier might be available if necessary to obtain counsel (see Pet. 11)—that the district court's statement justifies a multiplier even if *Delaware Valley II* is applicable here.

Respondents' eleventh-hour theory does not insulate from this Court's review the holding actually rendered by the court of appeals. The confusion and disruption that the Seventh Circuit's erroneous decision will engender cannot be avoided by pointing to an alternative rationale that might sustain the multiplier. The ruling below already has been followed in other cases (see Pet. 24-25 & n.9), and it is that precedent that "reintroduces much of the confusion over the availability of risk multipliers" (Nat'l Ass'n of Counties Am. Br. 5) that the Court sought to dispel in *Delaware Valley II*. For the reasons previously discussed, the important question presented here warrants resolution by this Court, and respondents' claim that they might be able to prevail on some other ground does not prevent review of that question.

Beyond this, the conclusory statement of the district court would not satisfy Justice O'Connor's concurring opinion in *Delaware Valley II*. The court's statement was not the result of an adversarial fact-finding hearing but instead was premised on boilerplate and self-serving affidavits offered by respondents, which refer without differentiation to "complex civil litigation" (Br. in Opp. App. 2a-3a, 8a, 19a, 26a) and seek to justify multipliers of up to three times the lodestar (*id.* at 5a, 26a). In fact, the identical affidavits have been used in other attorneys' fee cases. Contrary to respondents' assertion, affidavits of the kind submitted here have been held to fall well short of the showing necessary to justify a multiplier. See, *e.g.*, *Jenkins* v. *Missouri*, 838 F.2d 260, 268 (8th Cir. 1988), aff'd in part on other grounds, No. 88-64 (June 19, 1989), and cert. denied, 109 S. Ct. 221 (1988).

If the district court's casual statement—which contradicts its earlier detailed findings that the lodestar consti-

tuted a fully adequate attorneys' fee (see Pet. 7)—were sufficient to support a multiplier here, multipliers would become routine in all "complex civil litigation." Indeed, the present case—which attracted nine separate law firms, which was brought under a statute that specifically put counsel on notice from the outset that fees would be limited to actual time expended, and which "never proceeded very far beyond the initial pleading stages" (Pet. App. 64a)—is a particularly clear example of a situation in which a multiplier is *not* necessary. This Court could not have intended to open a gaping loophole in *Delaware Valley II* that would be available whenever counsel can procure stock affidavits in support of a multiplier from colleagues in the plaintiffs' bar. Accordingly, respondents' after-the-fact reliance on Justice O'Connor's concurrence in *Delaware Valley II* does nothing to dispel the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 974-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for Petitioner

JULY 1989

No. 88-1848

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ARLIE GLEN SKELTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

LOWELL E. SACHNOFF
Counsel of Record
JEFFREY A. SCHUMACHER
GARY S. CAPLAN
SACHNOFF & WEAVER, LTD.
30 S. Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000
Counsel for Respondents

Pandick Midwest, Inc., Chicago • (312) 733-6000

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

In our brief in opposition to GM's petition for a writ of certiorari, respondents first contended that there is no longer an Article III case or controversy because GM no longer has any economic stake in the fee issue it seeks to raise in this Court. Br. in Opp. at 4. GM disputed this fact in its reply brief. Reply Br. at 2-5. Now, on the basis of current information provided by the settlement fund administrator, it is unmistakably clear that under no set of circumstances can GM lay claim to any additional money if the fee enhancement award should be reversed and the money repaid to the settlement fund.

We attach the affidavit of Richard Hoyt, the president of Analytics, Inc., dated August 15, 1989. Analytics, Inc. is the independent, court-appointed settlement fund administrator. The affidavit of Mr. Hoyt confirms beyond doubt that the valid claims already filed by class members would fully exhaust the settlement fund even if the multiplier fees paid to class counsel were to be ordered repaid to the fund.

I. Mr. Hoyt's Affidavit Confirms GM's Lack Of Standing

GM asserts that it has standing "to seek review of respondents' legal entitlement to an enhanced fee" based on a possible reversionary interest provided for in the reverter clause of the Settlement Agreement (¶ 25). Reply Br. at 2. GM implies that if the risk multiple awarded by the district court is set aside, it will receive excess funds under the reversionary clause of the Settlement Agreement.

GM is wrong. As the affidavit of Mr. Hoyt demonstrates (App. at 2a), the claims already made by class members will more than consume any additional recovery if the Seventh

Circuit's decision allowing a risk multiple is overturned and no multiple is allowed. A reversal of the Seventh Circuit's decision will have *no impact whatsoever on GM.*

Additionally, contrary to its assertion, GM no longer has standing to seek certiorari arising from "the same interest that it had in the district court." Reply Br. at 3. GM at one time had a *potential* stake in the fees awarded to respondents, including the lodestar award, because any fee award would decrease GM's *potential* reversionary interest in leftover funds. But that potential interest has been extinguished because, as the Hoyt affidavit undisputably demonstrates, the valid claims already filed by class members will completely exhaust the settlement fund.

GM raises a new claim to a reversionary interest in money that might remain in the settlement fund because of "undeliverable ... lost and uncashed checks." Reply Br. at 2. However, any interest GM may have in money that might remain in the fund is totally independent of, and irrelevant to, the fees awarded to class counsel.[1] To date, there have been two distributions to the class. The funds leftover from uncashed checks after the first distribution were redistributed to the class in the second distribution. If the multiplier fee award were overturned, there would be a third distribution which would include the small amount of uncashed checks remaining after the second distribution. Thus, a decision by this Court with respect to attorneys' fees will not affect any potential interest GM may have in uncashed checks.

In fact, the amount of uncashed checks would actually decrease if there were a third distribution. If the multiple award is reversed, the fund administrator will only distribute funds to those class members who cashed their checks after

[1]The only reason that GM has any interest in funds from uncashed checks is because the costs of mailing to the class would outweigh the small amount of funds which might remain. As we explain herein, if the multiple award is reversed and the fees repaid by class counsel, any amount remaining will be *de minimis.*

the last disbursement which was just completed in June of this year. As a result, the existence of a current, fully updated class list would for all practical purposes eliminate any chance of undeliverable, lost and uncashed checks because those class members who received and cashed their checks in the most recent June distribution would do so again.

A reversal of the Seventh Circuit's decision will not make *any* additional funds available for reversion to GM. Therefore, GM has no standing to seek certiorari with respect to the award of a risk multiple.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LOWELL E. SACHNOFF
Counsel of Record
JEFFREY A. SCHUMACHER
GARY S. CAPLAN
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Chicago, IL 60606
(312) 207-1000
Counsel for Respondents

September 1, 1989

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE GENERAL MOTORS CORPORATION "THM 200" TRANSMISSION LITIGATION

ARLIE GLEN SKELTON, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendants.

No. 79 C 1243
Class Action
Honorable John Nordberg

JOSEPHINE C. NEWTON, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,

Defendants.

No. 80 C 2151
and consolidated cases

AFFIDAVIT OF RICHARD C. HOYT
President and Chief Executive Officer of Analytics, Inc.

1. I am the President and Chief Executive Officer of Analytics, Inc., which was appointed by the court to serve as Settlement Administrator for the processing of claims and the disbursements of the fund created in connection with the

settlement of *Arlie Glen Skelton, et al. v. General Motors Corporation*, 79 C 1243, and related cases.

2. In connection with the settlement, 145,585 claims were filed, of which 69,538 were found to be valid. The 69,538 valid claims include 4,552 claims from individuals who had previously received compensation from General Motors and who received a fixed payment of $65.93.

3. The average amount of classmembers' Eligible Qualified Repair Expense was $340.97.

4. Under the terms of Paragraph 26 of the Settlement Agreement, General Motors was required to contribute up to an additional $2,500,000 if, after payment of legal fees and settlement administration and other expenses, claimants received less than either (i) 75% of their Eligible Qualified Repair Expenses or (ii) 50% of their Qualified Repair Expenses. This $2,500,000 has been paid by General Motors and has been distributed to classmembers.

5. Because of the number of valid claims received, classmembers would have to be paid, from returned legal fees or other sources, an additonal $2,986,439 before General Motors would be entitled to any refund of the amounts it was required to contribute to the fund.

DATED: August 15, 1989

/s/ RICHARD C. HOYT
RICHARD C. HOYT

SUBSCRIBED and SWORN
to before me this 15th day of
August, 1989.

/s/ TAMARA L. TRIGGS
Notary Public

Supreme Court, U.S.
FILED
SEP 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1848

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER PURSUANT TO RULE 22.6 IN RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 974-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for Petitioner

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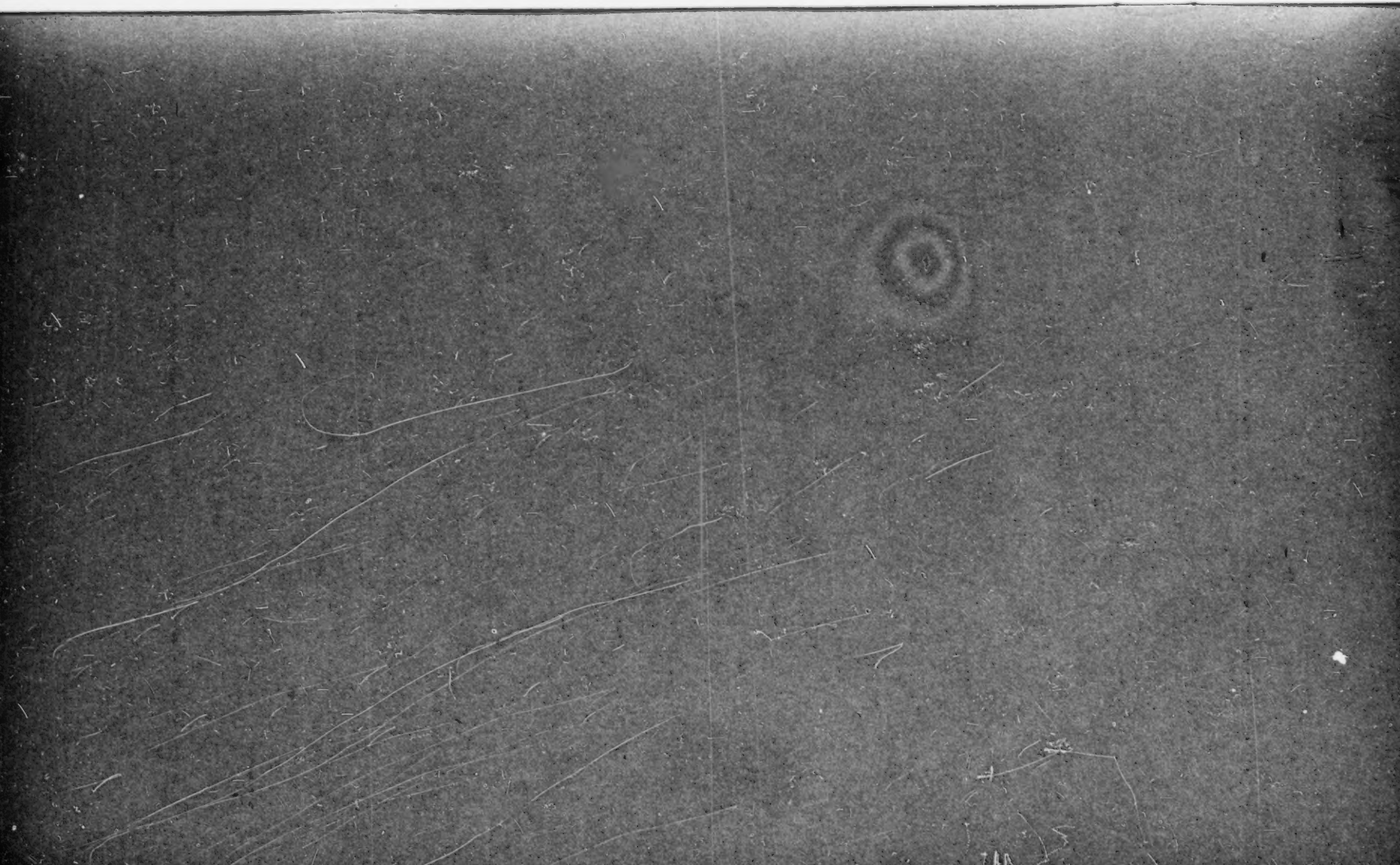

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SUPPLEMENTAL BRIEF FOR THE PETITIONER PURSUANT TO RULE 22.6 IN RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

This brief is filed pursuant to Rule 22.6 of the Rules of this Court to reply to respondents' supplemental brief based on the newly-submitted affidavit of Richard C. Hoyt.

Respondents' brief in opposition challenged GM's standing under Article III to seek review of the attorneys' fee multiplier. We demonstrated in our reply brief that GM does have the necessary standing on several different grounds. Respondents now attempt—based on an eleventh hour affidavit entirely outside the record—to raise the standing issue once again. Nothing in respondents' supplemental brief, however, undermines GM's

standing or provides any basis for the Court to deny review of the important attorneys' fee question presented in the petition for certiorari.

1. Respondents' supplemental brief is directed to only one of the several bases for GM's standing discussed in our reply brief. Accordingly, those other grounds for GM's standing are unrebutted.

Moreover, even as to the one ground that respondents do address, their argument is unavailing. Respondents do not dispute that under the reverter clause, GM has a right to the return of any sums that are unclaimed due to undeliverable, lost, or uncashed checks. See GM Reply Br. 2. Nevertheless, they assert that GM lacks standing because "[a] reversal of the Seventh Circuit's decision will not make *any* additional funds available for reversion to GM" (Resp. Supp. Br. 3 (emphasis in original)). This is simply incorrect.

Respondents assume that a distribution list, if recently compiled, constitutes an infallible means for disbursing funds to claimants. Both common sense and common experience indicate otherwise. Indeed, in this very case, more than $100,000 remained in unclaimed funds after the first distribution to the class in January 1989; and, contrary to the thrust of respondents' supplemental brief, a second distribution in May 1989—some four months after the initial distribution had been made—similarly resulted in thousands of dollars of unclaimed funds.

What is more, the reversal of the fee multiplier and ensuing distribution of those funds would occur not today, as respondents assume, but sometime next year, after the case has been fully briefed and argued and the Court has rendered a decision. Whatever its accuracy at the present time, therefore, the class list "completed in June [1989]" plainly would not be "a current * * * [and] fully updated * * * list" (Resp. Supp. Br. 3) in the spring or summer of 1990. In that circumstance, the

essential premise of respondents' argument disappears, and the existence of unclaimed funds can fairly be anticipated.

Thus, there is no basis in reason or in the record for respondents' cavalier assertion that no funds redistributed from counsel to the class members would ultimately revert to GM. Of course, it cannot be known to a certainty that unclaimed funds will exist; nor can the precise amount of any such funds now be ascertained. But neither of those conditions is necessary to establish Article III standing. Rather, the prospect that some funds will be unclaimed, together with GM's colorable right to that money, is sufficient. See, *e.g.*, *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 481 n.7 (1980); *United States* v. *SCRAP*, 412 U.S. 669, 688-690 & n.14 (1973).

2. Beyond this, respondents' ultimate position is simply untenable because it would mean that, as a practical matter, the fee multiplier awarded to counsel after a class action settlement would go unchallenged in any higher court. Under respondents' theory, the risk bonus of $1.2 million in this case—which dwarfs the average payment of $340 to each class member as shown by respondents' own affidavit (see Resp. Supp. Br. App. 2a, ¶ 3)—would effectively be insulated from further review. The courts that have considered the issue, while relying on a number of rationales, have uniformly held that former adversaries in litigation can challenge fee awards —even if the awards do not affect their total monetary liability—in order to safeguard the interests of plaintiffs that otherwise could not practicably be protected from the claims of their attorneys. See GM Reply Br. 4; see also, *e.g.*, *Jackson* v. *United States*, No. 87-6552 (9th Cir. Aug. 2, 1989) (defendant has standing to challenge attorneys' fee award that would reduce the amount plaintiffs receive under the Federal Tort Claims Act); *Cotter* v. *Bowen*, 879 F.2d 359, 362 n.4 (8th Cir. 1989) (defendant has standing to challenge a fee multiplier pay-

able out of the claimant's social security benefits); *Condon* v. *Bowen*, 853 F.2d 66, 69 n.1 (2d Cir. 1988) (Social Security Act); *Wyatt* v. *United States*, 783 F.2d 45, 46 (6th Cir. 1986) (Federal Tort Claims Act); *Freeman* v. *Ryan*, 408 F.2d 1204, 1205-1206 (D.C. Cir. 1968) (in federal milk order case, defendant has standing to challenge fee award payable out of fund escrowed for plaintiffs).

In sum, respondents have gone to extraordinary lengths to argue that this Court should not decide whether they or their clients are entitled to receive the $1.2 million at issue here. Not only have they filed a supplemental brief in a last-ditch effort to bolster their previous objection to GM's standing, but they have asserted a legal position that essentially would preclude appellate review of many attorneys' fee multipliers. Nothing in respondents' supplemental brief or in their brief in opposition provides any reason for the Court to deny review of the substantial and recurring question presented in this case.

Respectfully submitted.

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 974-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for Petitioner

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GENERAL MOTORS CORPORATION, PETITIONER

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ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SECOND SUPPLEMENTAL BRIEF FOR THE PETITIONER PURSUANT TO RULE 22.6

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 972-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1848

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SECOND SUPPLEMENTAL BRIEF FOR THE PETITIONER PURSUANT TO RULE 22.6

Pursuant to Rule 22.6 of the Rules of this Court, petitioner General Motors Corporation hereby advises the Court of an intervening development that occurred subsequent to the date of GM's last filing. On September 20, 1989, the United States Court of Appeals for the Seventh Circuit dismissed GM's appeal from the district court's order of May 1, 1989, which granted an attorneys' fee multiplier of 1.6 (Pet. App. 69a-72a). The district court's order was entered on remand from the court of appeals' decision that currently is before this Court for review on GM's petition for certiorari. See Pet. 9.

The Seventh Circuit has now held that GM's second appeal in this litigation is barred by law of the case principles and by the terms of the class action settlement agreement, which the court construed to preclude further appellate review. A copy of the court of appeals' order is reprinted in the appendix to this brief.

In light of the Seventh Circuit's recent order, it is clear that no further proceedings will occur in the lower courts on the merits of the attorneys' fee issue and that the judgment from which GM has sought certiorari represents the court of appeals' final and conclusive determination of that issue. In these circumstances, any question that the case is interlocutory has been dispelled, and the petition is plainly ripe for this Court's review at this time.

Respectfully submitted.

LOUIS H. LINDEMAN, JR.
LEE A. SCHUTZMAN
General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 974-1672

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
JOHN E. MUENCH
MARK I. LEVY
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600
Counsel for Petitioner

SEPTEMBER 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 20, 1989

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*

HON. JOHN L. COFFEY, *Circuit Judge*

HON. JOEL M. FLAUM, *Circuit Judge**

No. 89-2118

ARLIE GLEN SKELTON, JR., *et al.*,
Plaintiffs-Appellees,

vs.

GENERAL MOTORS CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

Nos. 79 C 1243, 80 C 2151
85 C 4805, 86 C 4986
86 C 4987

Judge John A. Nordberg

---

* The above motions were directed to the original panel hearing this case: Chief Judge Bauer, Judge Cudahy, and Judge Coffey. Due to a subsequent conflict of interest, Judge Bauer has recused himself and Judge Flaum has been substituted.

This matter comes before the court for its consideration of the following documents:

1. "APPELLEES' MOTION TO DISMISS AND FOR IMPOSITION OF SANCTIONS PURSUANT TO RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND MEMORANDUM IN SUPPORT THEREOF" filed herein on June 13, 1989, by counsel for the appellees.

2. "RESPONSE OF APPELLANT GENERAL MOTORS CORPORATION TO APPELLEES' MOTION TO DISMISS APPEAL AND FOR IMPOSITION OF SANCTIONS" filed herein on June 26, 1989, by counsel for the appellant.

3. "REPLY OF APPELLEES TO GENERAL MOTORS CORPORATION'S RESPONSE TO APPELLEES' MOTION TO DISMISS AND FOR IMPOSITION OF SANCTIONS" filed herein on June 29, 1989, by counsel for the appellees.

Appellees moved to dismiss the present appeal, arguing that the original settlement agreement entered by the parties below precluded reconsideration of the amount of any attorney fee multiplier and arguing that the law of the case further precluded reconsideration of whether a multiplier was appropriate, citing Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988). Appellees also moved for sanctions under Federal Rule of Appellate Procedure 38 and double costs for having to contest the frivolous appeal. We agree that the law of the case and settlement agreement preclude appellants from further appeal of this issue and that attorneys fees for opposing counsel is appropriate. Therefore,

IT IS ORDERED that appeal 89-2118 is hereby DISMISSED.

IT IS FURTHER ORDERED that appellees shall submit by October 5, 1989, a statement representing their attorney fees reasonably expended on the above appeal. Appellants shall respond with any objections within ten days of the filing of appellees' statement of fees.

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1848

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

~~MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND~~ BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

Of Counsel:
DANIEL V. GSOVSKI

MICHAEL HOENIG*
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500
Attorneys for
The Product Liability
Advisory Council, Inc.

July 14, 1989

*Counsel of Record

BEST AVAILABLE COPY

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ERRATUM RE CONSENT OF ALL PARTIES TO FILING OF BRIEF *AMICUS CURIAE*

Contrary to the first paragraph of the facing page, counsel for respondents have consented to the filing of the instant Brief *Amicus Curiae*. However,informal notification of such consent was not given until late in the day on July 13, 1989, at which time the Motion and Brief were in the final printing.

By virtue of the consent of all parties, copies of which are being filed herewith, the Motion for Leave to File, pp. i-v *infra*, requires no action by the Court, and should be considered only as the statement of Interest of the *Amicus*, in which capacity it has been incorporated by reference in the Brief. *Infra* at 1.

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Product Liability Advisory Council, Inc. ("PLAC", the "Council"), pursuant to Rule 36.1 of the Court, respectfully requests leave to file a brief *amicus curiae* in support of the petition of General Motors Corporation ("GM") for a writ of certiorari. Counsel for petitioner have consented to such filing, but counsel for respondents have not consented.

PLAC is a non-profit membership corporation formed in June, 1983, pursuant to Act 162, State of Michigan Public Acts of 1983.[1] Its principal purpose is the submission of appellate briefs, as friend of the court, in cases raising significant issues affecting substantive and procedural law in the area of product liability.

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1. PLAC members include: American Home Products Corporation, American Telephone & Telegraph Company, American Honda Motor Company, Inc., Automobile Importers of America, Inc., The Budd Company, Clark Material Systems Technology Company, The Coleman Company, Dow Chemical Company, Eaton Corporation, Federal Mogul Corporation, FMC Corporation, Fiat Auto U.S.A. and Ferrari, N.A., Firestone Tire & Rubber Company, Fruehauf Corporation, Great Dane Trailers, Inc., Hyundai Motor America, J.L.G. Industries, Kawasaki Motors Corporation, U.S.A., M.A.N. Truck & Bus, Mitsubishi Motor Sales of America, Monsanto Company, The Motor Vehicle Manufacturers Association of the United States, Inc., and its members, Nissan Motor Corporation, U.S.A., Otis Elevator Company, Playtex, Inc., Porsche Cars North America, Inc., RJR Nabisco, Inc., Saab-Scania America, Inc., Strum, Ruger & Company, Subaru of America, Inc., Toyota Motor Sales, U.S.A., Inc., U-Haul International, Inc., United States Tobacco, and Volkswagen of America, Inc.

The members of the Council are obvious and frequent "target defendants" in class actions of all types, among them entrepreneurial ventures by firms specializing in plaintiffs' commercial class actions such as this case. As such, Council members have real and recurring vital interests which are significantly and adversely impacted by the decision below.

The decision of the court of appeals, reported at 860 F.2d 250 (7th Cir. 1988), strikes at fundamental principles governing court awarded attorney fees in class actions. First, the court of appeals declared that the governing statute, 15 U.S.C. § 2310 (d)(2), which provides attorney fees to a plaintiff who "finally prevails," does not apply when a plaintiff class "prevails" by way of settlement. 860 F.2d at 256. Second, the circuit court found that the express Congressional mandate that such fees must be "based on actual time expended," even where applicable, "does not prevent the court from awarding risk multipliers." 860 F.2d at 256-57.

The foregoing errors, grave enough in themselves, were but the prelude to the circuit court's dispositive ruling. Citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 107 S.Ct. 3078 (1987) *(Delaware Valley II)*, the court of appeals recognized that a risk or contingency enhancement, even though not foreclosed, had been subjected to "stringent requirements." 860 F.2d at 254-57. The court below, however, deemed the policy rationale of *Delaware Valley II* inapplicable to "common fund" cases and accordingly declared its own "multiplier" rule without any further reference to this Court's decision. 860 F.2d at 257-58 (Opinion, Part II).

The resulting decision is diametrically opposed to the unanimous view of the Court that "risk multipliers," even if proper, are never case-specific, and falls equally afoul of the majority's holding that they should almost never exceed one-third of the lodestar. *Delaware Valley II*, 483 U.S. at —, 107 S.Ct. at 3089. Instead, the court of appeals specifically directed the district court "to examine plaintiffs' attorneys' reasons for asserting that *this class action* was a risky undertaking and to determine whether these reasons justify the *75% multiplier* they seek (or some multiplier less than that)." 860 F.2d at 258 (emphasis added). The upshot on remand was an additional charge of $1,408,680 against the fund available to the class in this case, over and above the lodestar attorney and paralegal fees of nearly $2.4 million originally awarded. 661 F. Supp. 1368, 1393 (N.D. Ill. 1987).

The members of the Council are understandably troubled by this development. Should the opinion below become the governing law, negotiated common fund settlement pots will require additional "sweetening" by defendants to accommodate a "second helping" by counsel. This increase in the price of settlement will be all but automatic in class actions, which require court approval based on fairness to the class.

The rule enunciated below threatens to drive up the cost of litigation in other ways. The circuit court's suggested *carte blanche* to double even multi-million dollar lodestars (860 F.2d at 258) will make previously marginal cases worth fighting to a finish. There is no readily discernible policy rationale for such a result. (Indeed, under the bizarre construction of the Magnuson-Moss Act adopted below, a defendant may often *reduce* its fee exposure by trying a losing case to

the bitter end.) The member companies of PLAC are directly affected and understandably distressed by the prospect of being conscripted into participation in so absurd an exercise.

The possible award of up to 200% multipliers in any given case will continue to skew the litigation process even after merits disposition or settlement. With millions at issue, fee-setting will, as here, generally metastasize into "a second major litigation," the very outcome which this Court has been at pains to avoid. E.g. *Hensley v. Eckerhardt*, 461 U.S. 424, 437 (1983). The further delay in disbursing the remaining fund to eligible class members while such litigation proceeds will largely vitiate the potential for recouping customer goodwill which often motivates settlement in commercial and consumer class actions.

Paying successful claimants' attorneys up to twice what a court has found reasonable will also clearly increase defendants' costs of doing business. These, like all costs, will in turn be passed on in the form of higher prices, lowered efficiency and other general economic burdens which, inevitably and ironically, ultimately penalize the consuming public as a whole, in order to enrich certain attorneys.

Such windfalls are not permitted even in cases involving major national policies, such as civil rights or the protection of the environment, e.g. *Delaware Valley II*. There is even less reason to tolerate them in the purely commercial arena. Certainly, the law firms typically involved in cases like the present action have no claim to largesse unavailable to their brethren of the public interest bar. The members of the Council, as litigants in both types of cases, are in a position to

observe and experience this unjustifiable incongruity at first hand.

The development of a comprehensive set of standards by which reasonable attorney fees can be determined without precipitating a second major litigation in each case came to fruition last Term in *Delaware Valley II*. The instant case provides an ideal opportunity to close the escape hatch in that scheme which the court of appeals' decision would open and to make explicit the obvious application of *Delaware Valley II* to all court awards of attorney fees. Significant resources at all levels of the justice system may then hopefully be returned to purposes more fitting than the preferential enrichment of certain segments of the bar.

WHEREFORE, it is respectfully requested that PLAC be granted leave to file the attached brief *amicus curiae*.

Respectfully Submitted,

Of Counsel:
DANIEL V. GSOVSKI

MICHAEL HOENIG*
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500
Attorneys for
The Product Liability
Advisory Council, Inc.

July 14, 1989

* Counsel of Record

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---

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS*

Amicus respectfully refers the Court to the accompanying Motion for Leave to file the instant brief, *supra* at i-v, which sets forth the interests of itself and its members in this case.

PRELIMINARY STATEMENT

Amicus adopts in its entirety petitioner's Statement appearing at pages 2-9 of the Petition. Petitioner's statement emphasizes and tellingly sets forth those aspects of the case which bear on the court of appeals' erroneous attempt to avoid applying *Delaware Valley II* to fees paid from a "common fund" rather than directly from a losing defendant's pocket.

Additional facts upon which *amicus* urges grant of the instant petition are set forth as part of *amicus'* statement of Reasons for Granting the Petition, directly below.

REASONS FOR GRANTING THE PETITION

I. UNLESS IMMEDIATELY CLOSED BY THIS COURT, THE "COMMON FUND LOOPHOLE" IN *DELAWARE VALLEY II* OPENED BY THE COURT OF APPEALS THREATENS ABSURD AND INDEFENSIBLE CONSEQUENCES, WHICH WOULD CALL SERIOUSLY INTO QUESTION THE INTEGRITY, ACTUAL AND PERCEIVED, OF THE JUDICIAL PROCESS

As indicated *ante* at ii-iii, the court of appeals' misconstruction of 15 U.S.C. § 2310 (d)(2) was but the stepping stone to the key feature of its decision. Waving aside this Court's recent teaching in *Delaware Valley II*, the circuit court apparently found that the $2.4 million "lodestar" awarded by the district court was not presumptively reasonable compensation to plaintiffs' counsel. The court then directed the district court to consider application of a fee enhancement or "multiplier" in an

amount up to the 75% bonus requested by counsel, noting that an additional 25% might properly be sought in other cases. The stated criterion for this award was to be the trial court's *ex post facto* view of the riskiness of this particular action, and the sole declared rationale for this approach was to compensate plaintiffs' counsel for other losing contingency fee cases. 860 F.2d at 254.

As the court below recognized, 860 F.2d at 257, both this result and its reasoning were "squarely addressed," and comprehensively rejected, in *Delaware Valley II*, in which a majority of the Court permitted the possibility of fee enhancements only where a class of cases proved incapable of attracting competent counsel in a particular market. See 107 S. Ct. at 3089 (O'Connor, J. concurring). Of particular relevance, all members of the Court in *Delaware Valley II* directly and specifically rejected, under any circumstances, the concept of a case-specific "risk multiplier" based on the prospects for success of a particular action. *Delaware Valley II* thus categorically "rejected [the] argument that a prevailing party was entitled to fee augmentation to compensate for the risk of nonpayment." *Missouri v. Jenkins*, 57 U.S.L.W. 4735, 1989 Westlaw 63856 (U.S.) at *4, No. 88-64 (June 19, 1989).

Defendants Are Vitally Interested in the Fair Disposition of Common Fund Settlements

The circuit court felt free to sidestep *Delaware Valley II*, based solely on the fact that this case involved a fee to be paid from a "common fund." The essence of

the court's analysis, repeated at various points throughout the opinion, is that

> [i]n a common fund case, where there is no direct or immediate danger of unduly burdening the defendant, a court has more latitude in exercising its equitable powers to determine whether the plaintiff class should compensate its attorneys for their risk of nonpayment. And it remains arguable that, at least in the common fund context, attorneys whose compensation depends on their winning the case, must make up in compensation in the cases they win for the lack of compensation in the cases they lose.

860 F.2d at 254. See also *id.* at 252-55, *passim*. This "distinction without a difference" rests on a demonstrably erroneous premise.

When cases are settled, as the overwhelming majority are, defendants will be every bit as burdened by common fund windfalls to plaintiffs' counsel as by equivalent statutory fee bonanzas. The reason is simple and obvious. Once "common fund multipliers" have been declared the law, they must, like any other financial factors, be taken into account in negotiating the amounts of future settlement funds. In class actions, moreover, court approval of settlements is mandated, and class members have a due process right to appear and voice objections as part of the process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Accordingly, sufficient increases in settlement common funds to allow for a full "second helping" to counsel will be demanded, with a straight face, in the name of "fairness to the class."

Thus, perversely, under the court of appeals' decision, it will often be in a defendant's interest to resist a

common fund settlement, particularly in a statutory fee case, whenever the common fund "sweetener" demanded is equal to or more than the incremental cost of defense.[2]

Beyond the fact that all funds, common or statutory, come from their pocket, target defendants such as petitioner and *amicus'* members are vitally interested in the fairness and equity with which any fund in court they create is divided between plaintiffs and lawyers. In this case, for example, petitioner faced claims under the Magnuson-Moss Act stemming from alleged shortcomings in its products. Key motivations a manufacturer may have in such a situation in agreeing to a prompt and generous settlement include the desire to satisfy its customers, recoup its goodwill, and restore its image following adverse publicity often generated by plaintiffs' counsel as a settlement lever. A court-imposed rule which strips away part of its customers' recovery in order to pay attorneys millions of dollars *over and above a presumptively reasonable "lodestar" fee* is hardly a matter of indifference to a defendant in such circumstances. No manufacturer wishes to risk being perceived by its customers as having compromised its warranty or other obligations to them while enriching a group of attorneys.

Numerous other indefensible aspects of this situation, particularly the conflicts of interest involved, are canvassed in the petition and will not be repeated here. *Amicus,* for its part, notes that even the "factual"

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2. In this case, for example, the nearly $1.5 million in enhancements, which the court of appeals conceded could not be awarded had the case been fought to a finish, would fund 10,000 hours of lawyer time at an average of $150 per hour.

premise of the circuit court's attempt to distinguish away *Delaware Valley II*, the defendant's supposed lack of financial interest in the attorney fee doctrine applicable to a settlement fund, is simply wrong.

Attorneys in Commercial Litigation Have No Special Claim to the Case-Specific Windfalls Rejected in *Delaware Valley II*.

Even if it were factually valid, the court of appeals' "common fund/statutory fee dichotomy" does not support a special multiplier rule in common fund cases. There is no equitable basis for allowing counsel to exact a greater toll from a fund's "faultless beneficiaries" than they would be permitted to collect from a defendant found guilty of wrongdoing. See Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 928 (1975). There are equally compelling reasons for not preferring one class of lawyers over another in awarding fees.

Under *Delaware Valley II*, "compensation for contingency must be based on the difference in market treatment of contingent fee cases as a class, rather than on an assessment of the 'riskiness' of any particular case." 107 S. Ct. at 3089 (O'Connor, J., concurring in judgment). Moreover, "[b]efore adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Ibid.* (plurality); 107 S. Ct. 3091 (O'Connor, J. concurring). It would be difficult to imagine a case farther removed from the relevant "counsel-finding" standard than the instant action.

The case below which was settled in Chicago consolidates five separate federal and state actions. 661 F. Supp. at 1372-74. By the time of settlement, no fewer than 29 lawyers from nine different law firms, including counsel from Washington, D.C., New York City, Chicago and Los Angeles, had devoted time to the matter and been awarded fees by the district court. *Id.* at 1393. Nothing in the record even suggests that this battalion was solely dependent on this action for its livelihood, or was otherwise unoccupied while this litigation proceeded.[3] It is equally difficult to view the prospect of $2.4 million in "lodestar" fees "based on actual time expended", 15 U.S.C. § 2310 (d)(2), as a disincentive to similar cases.

The rule announced by the court of appeals will often if not exclusively operate as it did below, allowing attorneys in purely commercial matters to reap fee harvests unavailable to those of the bar who elect to devote themselves to the vindication of less tangible interests, even where those interests are the declared objects of fundamental national policies. The absurdity and inequity of this result is so patent as to call into play a fundamental concern which has repeatedly found expression as courts have struggled with fee award questions—the integrity of the courts, and of equal importance, the public's perception of that integrity.

Indeed, it is interesting that this concern has often been best articulated precisely in commercial common fund cases, in which significant monetary recoveries so

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3. The 1989 edition of the Martindale-Hubbel directory of attorneys shows that the nine plaintiffs' firms in this case employ a total of approximately 130 attorneys. Counsel here clearly had the means to spread their risk and hedge their bets.

often supply the pretext for equally noteworthy fee requests:

> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough,* [105 U.S. 527 (1881)], when it advised that fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund.' 105 U.S., at 536.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974). See also e.g., *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 569-70 (7th Cir. 1951), *cert. denied,* 342 U.S. 909 (1952); *In re Armored Car Antitrust Litigation,* 472 F. Supp. 1357, 1382 (N.D. Georgia. 1979); *Cherner v. Transitron Electronic Corp.*, 221 F.Supp. 55, 61 (D.Mass. 1963) (Wyzanski, J.).

It is also significant, and ironic, that common fund fee award cases were among the very first to question the case-specific risk multipliers ultimately rejected by this Court in *Delaware Valley II,* on grounds fully applicable here. E.g. *City of Detroit v. Grinnell Corp.*, 560 F.2d at 1099 ("We have considerable doubt about the justice of charging members of one class higher fees to compensate counsel for failing to recover for another

class.") (quoting *Liebman v. J. W. Petersen Coal & Oil Co.*, 63 F.R.D. 684, 697 (N.D. Ill. 1974)).

In short, the common fund escape hatch from *Delaware Valley II* which the court of appeals created comports neither with policy, history, equity or logic. Review by this Court, *amicus* respectfully submits, is urgently needed.

II. THE COURT OF APPEALS' ERRONEOUS CONSTRUCTION OF THE FEE PROVISION OF THE MAGNUSON-MOSS ACT WILL SOW PLAIN FEDERAL ERROR AMONG THE STATE COURTS, IN WHICH MOST PRIVATE LITIGATION UNDER THE ACT IS CONDUCTED.

The precedential importance of the decision below is not confined to the federal courts, which have already cited and relied upon it several times. See Petition at 24-25 n.9. Because of the specific features of the enforcement structure of the Magnuson-Moss Act, the decision below will directly influence state court decisions across the nation in this area.

The Role of State Courts Under Magnuson-Moss

Though private actions under the Magnuson-Moss Act may be brought both in federal and state courts, Congress placed substantial jurisdictional barriers in the path of federal actions. 15 U.S.C. § 2310 (d)(1), 15 U.S.C. § 2310 (d)(3). These provisions, particularly as to multi-party and class actions, have been strictly

applied by the federal courts.[4] As a result, the state courts are, as Congress intended, the primary arena of litigation, both individual and class actions, under the statute.[5]

The court of appeals' decision in this case will inevitably be accorded great deference by state courts eager for authoritative guidance in applying the Act. The misconstructions of the governing provisions by the court of appeals which could thus infect the state court systems are fundamental. Under the court of appeals' erroneous reading, the clearly intended applicability of the Act to settlements and the prohibition on multipliers are both nullified. Differing state doctrines would thus control in each case, directly undermining the uniform prescriptive effect of the Congressionally specified fee provision. See *Walsh v. Ford Motor Co.*, 807 F.2d at 1014 (explicit federal prescriptions in the Act "apply as written.") Federal appellate review of state rulings following the court of appeals' decision is problematical. There is therefore no reason to withhold such review at this time.

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4. E.g., *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238 (2d Cir. 1986) (100 named plaintiff requirement for federal class action jurisdiction demands 100 claims sufficient to withstand summary judgment); *Saval v. BL, Ltd.*, 710 F.2d 1017 (4th Cir. 1983)(individual claims must meet standards of Rule 20, F.R.Civ.P, to be aggregated to satisfy $50,000 "in controversy" requirement).

5. 15 U.S.C. § 2310 (d). See *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007 n.38, 1013 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) (statute confines the "mine-run" of Magnuson-Moss cases to state courts).

The Court of Appeals' Erroneous Reading of the Act

In avoiding the plain text of the fee provisions of the Magnuson-Moss Act, the decision below is at odds with legislative history, the statutory scheme, and this Court's construction of similar language in other remedial Congressional enactments.

The court of appeals' professed inability to find evidence that the fee provision of Magnuson-Moss applies to settlements, 860 F.2d at 256 n.7, fails to square even with the statutory text. In fact, the settlement of this case, on its face, met both relevant statutory criteria for an award of fees under the Act. By establishing a minimum $17 million fund for their class, plaintiffs "finally prevailed," and that result was embodied in a "judgment" which included a fee award, exactly as prescribed by the Act. 15 U.C.S. § 2310 (d)(2).[6]

Moreover, as the Petition notes, at page 23, the drafters of the Act stated that a prevailing plaintiff, "if successful in the litigation (including settlement)", could invoke the Act's fee provision, in a Senate Report which the court of appeals appears to have overlooked. S. Rep. No. 151, 93rd Cong., 1st Sess. 22-23 (1973). Lastly, the policy considerations underlying the Act, particularly the explicitly declared Congressional encouragement of dispute resolution short of full trial, 15 U.S.C. § 2310 (a)(1), militate strongly in favor of the "plain meaning" of the statute. This Court's construction of the "prevailing party" requirement under similar enactments should accordingly govern the virtually

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6. The provisions of the Order of October 30, 1986, which dismissed all claims of the class with prejudice and awarded fees in accordance with the district court's opinion are summarized in the opinion below. 661 F. Supp. at 1396.

identical concept embodied in the Magnuson-Moss Act. See, *e.g.*, *Maher v. Gagne*, 448 U.S. 122, 129 (1980) (civil rights).

The reasoning by which the court of appeals purported to reconcile multipliers of up to 200% with the Congressional command that Magnuson-Moss fees shall be "based on actual time expended," 860 F.2d at 257, is pure sophistry. On this basis, any fee can be supported as "based on actual time expended" merely by the application of an appropriate multiplier. Arithmetic cannot be made to substitute for policy. In addition, the reading adopted below, by rendering the quoted language superfluous, directly violates the fundamental canon of construction that Congressional enactments shall be construed so as to give meaning and effect to all their provisions. E.g., *Fidelity Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 163 (1982); *Jarecki v. Polaroid Corp.*, 367 U.S. 303, 307-08 (1961) (Where a "statute admits a reasonable construction which gives effect to all its provisions, ... we will not adopt a strained reading which renders one part a mere redundancy.")

Such judicial nullification of statutory language is especially indefensible where the provision at issue is a distinguishing characteristic of the statute under consideration. In fact, Magnuson-Moss is one of several statutes among the two hundred odd attorney fee provisions of the federal code in which Congress took the trouble to insert language restricting fees to those

"based on actual time expended."[7] E.g. 15 U.S.C. § 2060(f) (Consumer Product Safety Act); 49 U.S.C. § 1686 (e) (Liquid Gas Pipeline Safety Act; and 49 U.S.C. § 2014(e) (Hazardous Liquid Pipeline Safety Act). This vital language cannot, as below, simply be read out of the Act.

CONCLUSION

For the reasons stated, *amicus* respectfully submits that the petition should be granted.

Respectfully Submitted,

Of Counsel:
DANIEL V. GSOVSKI

MICHAEL HOENIG*
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-5500
Attorneys for
The Product Liability
Advisory Council, Inc.

July 14, 1989

*Counsel of Record

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7. Indeed, the only language in 15 U.S.C. § 2310 (d)(2) sanctioning any departure from the "lodestar" amount grants the court discretion to dispense with fees entirely where an award would be "inappropriate". Thus, Congress, in Magnuson-Moss, authorized reasonable attorney fees "based upon actual time expended" or a court's disallowance of such fees. It did *not* authorize an *increase* in such fees.

No. 88-1848

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,
v.
ARLIE GLEN SKELTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

This Court has recognized that actions brought pursuant to a federal statute that provides for an award of attorney's fees may be—and frequently are—compromised prior to judgment for a single lump sum payment that settles both the defendant's liability on the merits and his liability for attorney's fees. *Marek v. Chesney*, 473 U.S. 1 (1985).

The question presented in this case is whether, when a class action is settled in this manner and the court is called upon to fix the portion of the settlement fund to be allocated to attorney's fees, the availability of a "risk multiplier" is governed by this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987), or whether—as the court of appeals held—a risk multiplier may routinely be awarded without reference to the standard set forth in *Delaware Valley*.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

The question presented in this case regarding the scope of this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711 (1987) (*Delaware*

Valley II), is of obvious importance to state and local governments: they, together with their officials, are among the defendants most frequently sued under federal statutes providing for awards of attorney's fees. *See, e.g.*, 42 U.S.C. § 1988 (authorizing award of attorney's fees in actions brought under the federal civil rights laws). In fact, most of this Court's cases construing fee-shifting statutes have involved fee awards against state and local governments or their officials. See pages 6-7, *infra*.

The court of appeals' conclusion that the limitations established by Congress on the availability of risk multipliers must be ignored when a monetary fund is produced by settlement of a class action prior to judgment—and a fee awarded to class counsel far higher than that permissible under the statutory criteria—will adversely affect *amici* and their members in several ways. Most important, allowing routine awards of risk multipliers will alter the incentive structure established by Congress, "authoriz[ing] the highest fees in cases least likely to be won and hence encouraging the bringing of more risky cases," even though Congress did not want to encourage the filing of such suits. *Delaware Valley II*, 483 U.S. at 725, 726 (plurality opinion). Indeed, because the court of appeals' "exception" to the rule set forth in *Delaware Valley II* appears to apply principally to class actions, the court's approach provides an incentive for the filing of class actions whenever possible, even if the invocation of that complex procedural mechanism is not necessary to serve the interests of those injured by allegedly wrongful conduct.

Second, this legal rule will tend to inflate settlement costs. Plaintiffs' attorneys will put a higher price on settlement so that the dollar value of the monetary fund will be large enough to allow them to recover fees in excess of the amount Congress determined to be proper.

The final, and even more troubling, aspect of the court of appeals' ruling is that government entities, like other defendants, settle cases in large part to confer benefits on the plaintiffs—to compromise past claims and foster an amicable relationship for the future—not to line attorneys' pockets. Indeed, because governmental entities have an overarching responsibility to safeguard the rights of their citizens, they have an additional interest in ensuring that injured parties—rather than their attorneys—obtain as large a share as possible of the public funds expended in settlement of a claim. The decision of the court of appeals authorizes the diversion of large chunks of such settlement funds in the form of excessive attorney's fee awards. Because the court of appeals' decision in this case will thus have a direct effect on several matters of substantial importance to *amici* and their members, *amici* submit this brief to assist the Court in determining whether the petition for a writ of certiorari should be granted.*

STATEMENT

This class action was instituted under the Magnuson-Moss Act, 15 U.S.C. §§ 2301 *et seq.*, on behalf of a class of consumers seeking damages for alleged defects in the transmissions in certain lines of automobiles manufactured by the General Motors Corporation ("GM"). The statute provides in pertinent part that "[i]f a consumer finally prevails" in an action under the statute, he may recover as part of the judgment "a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended)." 15 U.S.C. § 2310(d)(2).

GM settled the case prior to trial. The settlement established a $17 million fund to reimburse the class members for service and repair costs resulting from trans-

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* The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

mission failure. It further provided that attorney's fees for plaintiffs' counsel would be paid solely from the settlement fund; the determination of the amount of fees was left to the court. Any portion of the settlement fund remaining after distribution to the class members and payment of the attorney's fees would revert to GM.

The district court limited the attorney's fee award to the lodestar amount, rejecting the request of plaintiffs' counsel for a "risk multiplier." The court stated that "the standards for determining reasonable attorneys' fees in common fund cases and statutory fee cases should not be significantly different" (Pet. App. 29a (footnote omitted)). Because the action was commenced under the Magnuson-Moss Act, "any limitation contained in the * * * Act is a relevant consideration in determining whether to award a 'risk' multiplier in this case. The structure of the settlement agreement should not divert the court from the Congressional intent underlying the passage of this Act" (*id.* at 57a-58a).

The district court concluded that the "plain language" of the Magnuson-Moss Act bars a risk multiplier for fees awarded under that statute (Pet. App. 58a). Even if a multiplier were permissible, the court added, it was not appropriate on the facts of this case (*id.* at 59a-65a).

The court of appeals reversed, holding that "the fee-shifting provision of the Magnuson-Moss Act should [not] affect the fee determination in this case" (Pet. App. 9a). Instead, according to the court of appeals, "when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees" (*id.* at 12a).

The court of appeals directed the district court to redetermine the multiplier issue without reference to the factors set forth in this Court's decision in *Delaware Valley II* (see Pet. App. 14a-16a). On remand, the district court approved a multiplier of 1.6 (*id.* at 69a-72a), which resulted in an additional $1.2 million in attorney's fees.

ARGUMENT

I. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED BY THIS COURT BECAUSE IT CREATES CONSIDERABLE UNCERTAINTY REGARDING AN IMPORTANT ISSUE IN ATTORNEY'S FEE LITIGATION AND THREATENS TO SUBJECT STATE AND LOCAL GOVERNMENTS TO THE VERY BURDENS THAT THIS COURT SOUGHT TO ELIMINATE THROUGH ITS DECISION IN *DELAWARE VALLEY II*

This Court in *Delaware Valley II* addressed the availability of risk multipliers under federal fee-shifting statutes; that decision provides guidance concerning the circumstances in which award of a multiplier is proper, resolving the considerable confusion regarding that issue that had developed in the lower courts. The court of appeals' holding that *Delaware Valley II* does not apply in determining how much of a lump-sum settlement may be allocated to attorney's fees reintroduces much of the confusion over the availability of risk multipliers that led the Court to hear *Delaware Valley II* in the first place and, in addition, subjects defendants to the litigation burdens that *Delaware Valley II* sought to eliminate. This Court should grant review in the present case—as it did in *Delaware Valley II*—to consider whether the court below correctly determined that attorney's fee awards may be calculated in a manner that leads to these disturbing consequences.

Litigation over attorney's fees has become a staple of modern civil practice. Approximately 200 federal statutes authorize awards of attorney's fees; included among these are several statutes invoked by plaintiffs with considerable frequency. See 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* 5-3 to 5-7 (1989). In view of the large number of cases in which courts award attorney's fees under fee-shifting statutes, it is especially important that there be as little confusion as possible regarding the legal standards governing fee awards. Moreover, the particular circumstance involved in this case—payment of a single sum to settle both the plaintiffs' damages claim and the attorney's fee issue—is a common form of settlement in cases in which federal law subjects the defendant to liability for fees. *Evans v. Jeff D.*, 475 U.S. 717, 733-737 (1986). Clarity in the law is especially important in this frequently recurring context.

The general significance of these issues is greatly magnified for state and local governments because, together with their officials, they are much more likely than the ordinary civil litigant to find themselves named as defendants in actions brought under federal statutes that authorize an award of attorney's fees to the prevailing party. The statute providing for attorney's fee awards in actions under the federal civil rights laws, 42 U.S.C. § 1988, accounts for much of the fee litigation against state and local governments; and this Court's docket amply substantiates how frequently these entities are held liable for attorney's fees. Most of the decisions construing federal fee-shifting statutes have come in cases involving fee awards assessed against a state or local government or official. *See, e.g., Missouri v. Jenkins*, No. 88-64 (U.S. June 19, 1989); *Texas State Teachers Ass'n v. Garland Independent School District*, 109 S. Ct. 1486 (1989); *Blanchard v. Bergeron*, 109 S. Ct. 939 (1989); *Delaware Valley II*, *supra*; *Hewitt v. Helms*, 482 U.S. 755 (1987); *City of Riverside v.*

Rivera, 477 U.S. 561 (1986); *Evans v. Jeff D.*, *supra*; *Kentucky v. Graham*, 473 U.S. 159 (1985); *Spencer v. South Carolina Tax Comm'n*, 471 U.S. 82 (1985) (per curiam); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 425 (1983). Because the same legal standards generally apply under all free-shifting statutes (*Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 559-560 (1986)), the rule adopted in the present case may govern the availability of risk multipliers in actions against state and local governments under other federal statutes. *Cf. McGuire v. Sullivan*, 873 F.2d 974 (7th Cir. 1989) (invoking rule adopted by court below to interpret provision of the Social Security Act regarding award of attorney's fees).

The Seventh Circuit's conclusion that *Delaware Valley II*'s principles regarding the availability of risk multipliers are irrelevant in cases in which both the liability and attorney's fee issues are settled at the same time creates considerable confusion with respect to the adjudication of attorney's fee issues in the large class of cases in which such settlements are reached. As noted in the petition for certiorari (at 14-15), other courts of appeals have held that the *Delaware Valley II* standard applies even if a case is settled.

Moreover, the court's decision essentially provides a road map to plaintiffs' class counsel interested in circumventing the limits on risk multipliers established by *Delaware Valley II*. All that counsel must do is enter into a lump sum settlement. Under the court of appeals' approach, the district court will then be able to award a multiplier that would have been impermissible had the attorney's fee question been litigated directly under the fee-shifting statute.

State and local governments are likely to feel the brunt of the multiple litigation burdens that will result from the approach taken by the court of appeals in this case. First, allowing risk multipliers on a more liberal basis

significantly alters the incentives for commencing lawsuits under federal statutes that have fee-shifting provisions. A key element of the rationale of the *Delaware Valley II* plurality was that risk multipliers should be curtailed to avoid providing an incentive for the bringing of marginal claims. 483 U.S. at 725-726 (plurality opinion); *see also id.* at 733-734 (O'Connor, J., concurring). Expanding the availability of multipliers beyond the bounds fixed in *Delaware Valley II*, as the court of appeals has done here, will have precisely the opposite effect, encouraging plaintiffs' attorneys to institute "long-shot" actions in the hope that, if such a claim is successful, they will receive a large risk multiplier. In addition, because the court of appeals' approach appears to apply principally to settlement funds generated by class actions, these marginal claims will likely be clothed in class action garb, and therefore carry with them the difficult procedural rules—and extra costs—associated with that type of complex litigation.

Second, ignoring *Delaware Valley II*'s limitations on risk multipliers will lead to complex litigation over the proper amount of the multiplier in each individual case. As both the plurality and Justice O'Connor observed in *Delaware Valley II*, "in order to determine the proper size of the contingency bonus, a court must retroactively estimate the prevailing party's chances for success from the perspective of the attorney when he first considered filing the suit. Not only is this mathematically difficult to compute, but 'once the result is known, it is hard for judges and lawyers to regain a perspective of ignorance and to treat the result as only one of several that were initially possible.'" 483 U.S. at 722 (plurality opinion; citation omitted); *see also id.* at 732 (O'Connor, J., concurring). The Court has repeatedly cautioned that fee disputes "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. at 437.

Finally, the court of appeals' rule is likely to increase settlement costs. Class counsel will place a greater settle-

ment value upon a case because of the larger attorney's fee available under the non-*Delaware Valley II* framework. These higher costs will of course adversely affect state and local governments that enter into such settlements. In some cases, the higher costs may actually obstruct settlement: one incentive for a defendant to settle a case is avoiding the costs of litigation, chief among which are attorney's fees. Impairing settlements will not only adversely affect state and local governments by requiring them to litigate to judgment, but will in some cases thwart the will of Congress. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

It may be argued that the cost of settlement need not increase because the plaintiffs' compensation can be reduced to pay the larger attorney's fee. This alternative is in some ways even more unpalatable. It would set up an inherent conflict of interest between class counsel and the members of the plaintiff class. If a case is litigated to final judgment and fees sought directly under the statute, counsel could obtain a risk multiplier only by satisfying the stringent *Delaware Valley II* standard; also, the fee award would not reduce the amount of the plaintiffs' recovery. If, however, the case is settled prior to judgment, counsel has the opportunity to pocket a larger fee, because *Delaware Valley II*'s limitations on risk multipliers would not apply. In addition, the fee award would reduce the amount of the settlement fund disributed to the class members. Thus, counsel has a considerable personal incentive to reach a settlement, because of the larger fees likely to be awarded, even if settlement would not be in the best interests of the class. There is no justification for adopting a legal rule that gives plaintiffs' lawyers a strong economic incentive to act against the interests of their clients.

State and local governments—like all defendants—have a strong interest in ensuring that funds expended in settlement of a claim actually go toward ameliorating

the damage suffered by the plaintiff. They hope that the amicable resolution of a dispute will engender goodwill and place the relationship between the parties on a positive footing for the future. In the case of government entities, this interest is supplemented by their responsibility to safeguard the rights of their citizens. Because the court of appeals' rule would divert to attorneys more of these funds, without authorization by Congress, it interferes with these interests in controlling the use of settlement payments.

In sum, the court of appeals' decision recreates the uncertainty regarding the availability of risk multipliers that this Court sought to eliminate when it decided *Delaware Valley II*. Because of that uncertainty, and the practical burdens imposed upon defendants in general—and state and local governments in particular—by the rule adopted by the court of appeals, this Court should grant the petition and consider the applicability of *Delaware Valley II* to the settlement context.

II. THE COURT OF APPEALS ERRED IN AUTHORIZING WHOLESALE CIRCUMVENTION OF THIS COURT'S DECISION IN *DELAWARE VALLEY II*

The court of appeals' decision is not only important, it is also plainly wrong on the merits. The decision rests entirely on the conclusion that a court sitting in equity to allocate the proceeds of a settlement fund may ignore Congress's standards for determining a reasonable attorney's fee. That conclusion is erroneous.

Federal fee-shifting statutes generally authorize a "prevailing party" to seek an award of fees; a plaintiff who obtains relief pursuant to a settlement usually qualifies as a "prevailing party." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). And a fee award directly under such a statute would, of course, be limited by *Delaware Valley II*. Federal fee-shifting statutes thus permit risk multi-

pliers to only a limited degree, if at all, when a plaintiff prevails by virtue of settlement.

The court of appeals' startling conclusion that this statutory principle must be cast aside in this case rests on the fact that the fees here were not awarded directly under the statute, but instead were awarded on an equitable "common fund" theory. But surely a court of equity must accord considerable weight to Congress's considered judgment as to the measure of a reasonable attorney's fee, especially where Congress prescribed the standard governing availability of risk multipliers in cases in which an action under a statute with a fee-shifting provision culminates in a settlement favorable to the plaintiff.

This Court previously has invoked the principle that "equity follows the law" in requiring federal courts to exercise their equitable powers in line with standards set forth by Congress. *See, e.g., INS v. Pangilinan*, 108 S. Ct. 2210, 2215-2216 (1988); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576-577 n.9 (1984); *see also In re Fulghum Construction Corp.*, 706 F.2d 171, 173 (6th Cir.) (application of equitable doctrine "must 'comport to and remain compatible with the prevailing legislative intent'") (citation omitted), *cert. denied*, 464 U.S. 935 (1983). Here too, courts should adhere to the standard prescribed by Congress in exercising their equitable authority to award a reasonable attorney's fee. Because the court of appeals substituted its own rules for Congress's considered limitations on attorney's fee awards, its judgment should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

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